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IN THE

# Supreme Court of the United States

OCTOBER TERM 1970

No. 1026

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FENTON, *et al.*,

*Appellants,*

—v.—

BOSTON SCHOOL COMMITTEE,

*Appellee.*

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ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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## JURISDICTIONAL STATEMENT

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MELVIN L. WULF
LAWRENCE G. SAGER
PETER TEAGUE
*American Civil Liberties Union Foundation*
156 Fifth Avenue
New York, N. Y. 10010

ROY A. HAMMER
73 Tremont Street
Boston, Massachusetts 02108

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In the

# Supreme Court of the United States

October Term 1970

No. ———

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Fiorvit, et al.,

*Appellants,*

—v.—

Boston School Committee,

*Appellee.*

---

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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## JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Judicial Court of Massachusetts, entered on July 3, 1970, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

### Opinions Below

The opinion of the Supreme Judicial Court of Massachusetts is reported at 260 N.E.2d 676 (Mass. Edition). The opinion of the Superior Court for Suffolk County, is unreported. Copies of the opinions are set out in the Appendix, *infra*, pp. 2a and 14a.

## Jurisdiction

This suit originated through a bill in equity and petition for declaratory judgment filed by appellants in the Superior Court, Suffolk County, Massachusetts, on September 24, 1968. The judgment of the Superior Court was entered January 6, 1969. On appeal, the judgment of the Massachusetts Supreme Judicial Court affirming the decision of the Superior Court was entered on July 3, 1970. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Judicial Court of the State of Massachusetts on September 30, 1970. On September 29, 1970, Mr. Justice Brennan granted a timely application to extend appellants' time to file their jurisdictional statement to and including October 31, 1970. On October 22, 1970, Mr. Justice Brennan again granted a timely application to extend appellants' time to and including November 30, 1970.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2).

## Statutes Involved

TENURE OF TEACHERS

> Every school committee, in electing a teacher . . . who has served in its public schools for the three previous consecutive school years . . . shall employ him to serve at its discretion. . . . A teacher or superintendent not serving at discretion shall be notified in writing on or before April fifteenth whenever such person is not to be employed for the following school year. Unless

said notice is given as herein provided, a teacher or superintendent not serving at discretion shall be deemed to be appointed for the following school year.

Mass. G. L., c. 71, Section 41, as amended through St. 1956, c. 132.

DISMISSAL OF TEACHERS

The school committee may dismiss any teacher, but no teacher . . . shall be dismissed unless by a two-thirds vote of the whole committee. In every such town a teacher or superintendent employed at discretion under the preceding section shall not be dismissed, except for inefficiency, incapacity, conduct unbecoming a teacher or superintendent, insubordination or other good cause, nor unless at least thirty days, exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so requests, he shall have been furnished by the committee with a written charge or charges of the cause or causes for which his dismissal is proposed; nor unless, if he so requests, he has been given a hearing before the school committee which may be either public or private at the discretion of the school committee and at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and examine them; nor unless the charge or charges shall have been substantiated; nor unless, in the case of a teacher, the superintendent shall have given the committee his recommendations thereon. . . .

Mass. G. L., c. 71, Section 42, as amended through St. 1966, c. 185.

SUSPENSION OF TEACHERS

The school committee may suspend any teacher, but no teacher shall be suspended for more than ten days . . . unless by a two thirds vote of the whole committee. In every such town a teacher . . . employed at discretion under section forty-one shall not be suspended, under the provisions of this paragraph, except for unbecoming conduct or other good cause, nor unless at least seven days exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so requests, he shall have been furnished by the committee with a written charge or charges of the cause or causes for which the suspension is proposed; nor unless, if he so requests, he has been given a hearing before the school committee which may be either public or private at the discretion of the school committee and at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and to examine them and to cross-examine other witnesses; nor unless the charge or charges shall have been substantiated; nor unless, in the case of a teacher, the superintendent shall have given the committee his recommendations thereon. No teacher . . . shall be suspended for a period exceeding one month, nor shall such teacher or superintendent receive compensation for any period of lawful suspension. No teacher . . . shall be interrogated prior to any notice given to him relative to a hearing on suspension unless he is notified of his right to be represented by counsel during any such investigation.

**The school committee, a superintendent or any other school official designated for the purpose, by the superintendent, may, notwithstanding any provision of this section to the contrary, suspend for a period of not more than seven days a teacher for unbecoming conduct or for any other cause which such committee, superintendent or official deems adequate.**

**Added by St. 1966, c. 185, section 3. Amended by St. 1968, c. 156.**

**Mass. G. L., c. 71, Section 42D (St. 1966, c. 185, Section 3, as amended by St. 1968, c. 156).**

## Questions Presented

1. Whether appellants, as non-tenured public school teachers, were constitutionally entitled to procedural due process prior to their suspension and dismissal.

2. Whether there is a substantial likelihood that appellants' dismissal was based upon activities which are protected by the First Amendment.

3. Whether a statutory scheme which grants procedural rights to tenured teachers but withholds them from non-tenured teachers violates the equal protection clause.

## Statement of the Case[1]

The appellants were employed by the school committee as teachers in the Boston public schools for the school year beginning September 1, 1968, and ending August 31, 1969. None of the appellants was serving "at discretion" (i.e., "on tenure") as that term is defined in G. L. c. 71, §41. Though all the appellants had been employed by the school committee in the previous school year (App., *infra*, pp. 5a-6a), none of them had been notified by April 15, 1968, that they were not to be employed for the next school year, as required by G. L. c. 71, §41, as amended (*supra*, pp. 2-3) (*ibid.*). Each of the appellants was assigned to the Christopher Gibson School (Gibson School), an elementary school in the Dorchester district of Boston. The number of pupils registered at the Gibson School for that year was approximately 400, of whom over ninety percent were of the black race. The Gibson School had become the focal point of a controversy concerning the extent of direct community participation or control which should be exercised or allowed in the schools. Each of the appellants were in favor of enlarged community control over the operations of the Gibson School and had evidenced this view in many different ways, including a letter to a newspaper (Exhibit 6), a petition (Exhibit 10), and by taking part in many meetings with members of the community espousing such views (App., *infra*, p. 15a).

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[1] The Statement of the Case is taken verbatim from the opinion of the Supreme Judicial Court of Massachusetts. The Statement, however, is supplemented by a number of undisputed facts of record. Those supplementary facts are each supported by appropriate references to the record.

On September 4, 1968, the first day of classes, a demonstration took place at the Gibson School, in which various persons not connected with the school (except that some appear to have been parents of children in the school) entered the school building and each classroom, claiming to be the new principal and school staff. Appellants took no part in these events (App., *infra*, pp. 16a-16aa).

On the next day, September 5, the demonstrators returned. Police had been stationed at the door of the school to prevent the entry of unauthorized persons. Some of the demonstrators went behind the school to the yard where the children were being assembled for the start of classes, and announced that there would be no school that day at the Gibson School. Almost all the children were then led by the demonstrators to the Robert Gould Shaw House, a community center. The appellants, without informing, consulting with, or obtaining the consent of the superiors at the school, accompanied the demonstrators and the children to the Shaw House (described as a "liberation school") and conducted their classes there for the entire day. Appellants had no prior knowledge that the parents intended to take their children to the Shaw House (App., *infra*, p. 12a). They considered it their primary duty to teach the students wherever they were, even if that meant accompanying them to the Shaw House (Tr. 344).[2]

The appellants reported to the Gibson School on the next morning, September 6, but were refused admittance. They were informed that they had been suspended for seven days by the Superintendent of Schools for unauthorized absence

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[2] The symbol "Tr." refers to the transcript of proceedings in the Superior Court which is part of the record on appeal.

on September 5.[3] The appellants continued to teach at the Shaw House, where a considerable number of students from the Gibson School were still being taught.

On September 6, the school committee notified the appellants of a hearing "on your suspension" to be held on September 11. No additional notice of charges against the appellants was given. The appellants, who were represented by counsel at the September 11 hearing, requested a continuance and a public hearing. The committee voted to terminate the appellants' contracts effective thirty days after delivery of notice, and to suspend the appellants for those thirty days for "conduct unbecoming teachers." The committee also voted to give the appellants a closed hearing on September 25. No guidelines, ground rules, notice of charges or other procedures for the projected hearing were adopted or announced (Exhibit 1). Prior to the committee vote of September 11th, there was no discussion by appellants with the members of the school committee, despite a request for such a discussion (Tr. 493). Nothing in the record or transcript indicates that any members of the committee acted on anything but hearsay information (Exhibit 1).

The appellants declined to attend the September 25th hearing and instead instituted suit.[4]

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[3] The appellants have waived any claim that this initial suspension was unlawful.

[4] The Supreme Judicial Court of Massachusetts, in footnote 3 of its opinion, says (App., *infra*, p. 4a):

"Because of the lack of notice of the specific charges against the plaintiffs, the judge did not treat the plaintiffs refusal to attend the offered hearing on September 25 as a waiver of the right to a hearing."

The Superior Court held that appellants were not entitled to any hearing and that Sections 42 and 42D were not unconstitutional, either as written or applied (App., *infra*, p. 25a). Though finding that appellants "were not in any way penalized by the committee for such views [concerning enlarged community control] or for the exercise of their constitutional right of free speech and association" (App., *infra*, p. 15a), the court characterized all of the events as "lawless action of a group which went far beyond the outer limits of protest and dissent" (App., *infra*, p. 20a). In support of that conclusion, the court quoted at length from Justice Fortas' "Concerning Dissent and Civil Disobedience" and from an article by an officer of the American Bar Association (App., *infra*, pp. 20a-24a). The court concluded that "Those who play with the matches of anarchy often burn their own fingers" (App., *infra*, p. 24a).

The Supreme Judicial Court of Massachusetts affirmed the decision of the Superior Court.

## How the Federal Questions Were Raised

Appellants challenged the constitutionality of Sections 42 and 42D on due process and equal protection grounds in their Bill in Equity and Petition for Declaratory Judgment, as amended (Record before the Supreme Judicial Court of Massachusetts, pp. 4, 9-10) and also challenged on the same constitutional grounds the denial of a due process hearing prior to their dismissal (*ibid.*). These constitutional claims were expressly considered and rejected by both courts below (App., *infra*, *passim*).

## The Questions Are Substantial

Three claims of constitutional deprivation flow from the appellants' dismissal without benefit of a hearing: procedural due process, freedom of speech, and equal protection. While these claims are analytically discrete, they are in fact very much interdependent. Thus, the claim that the appellants were entitled to a hearing is informed throughout by the free speech implications of their dismissal; and, in turn, the force of their claim that they have been denied the equal protection of the laws is very much intensified by the constitutional strength of their due process claim. The arguments below are ordered to best facilitate their understanding in light of this interconnection.

## I.

## Appellants were constitutionally entitled to procedural due process prior to their suspension and dismissal.

Despite statutory language which could easily be interpreted otherwise, the Supreme Judicial Court of Massachusetts has held that the appellants, as non-tenured teachers, are vulnerable to suspension and summary dismissal without any of the basic elements of procedural due process. Its rationale, drawn from an erroneous reading of *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961), was that government employees are simply not entitled to notice or hearing of any sort upon the occasion of their public employer's decision to discharge them. Appendix, *infra*, pp. 10a-12a. Such a blanket denial of due process ignores and conflicts with the constitutional equation which has been articulated by this Court. Moreover,

it would effectively deny public employees of all substantive constitutional rights in connection with their employment, an especially odious result where the right to free expression of public school teachers may be involved.

There is no all-or-nothing litmus test of entitlement to due process:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' Joint Anti-Fascist Refugee Committee v. McGrath, 341 US 123, 168, 95 L Ed 817, 852, 71 S Ct 624 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in Cafeteria & Restaurant Workers Union v. McElroy, 367 US 886, 895, 6 L Ed 2d 1230, 1236, 81 S Ct 1743 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also Hannah v. Larche, 368 US 420, 440, 442 (1960)." *Goldberg* v. *Kelly*, 25 L. Ed.2d 287, 296 (1970).

The professional interests of the appellants which were at stake in their dismissal were, of course, of great magnitude. Dismissal from the Gibson School necessarily included exclusion from the entire Boston school system. *Downey* v. *School Committee of Lowell*, 305 Mass. 329,

25 N.E.2d 738 (1940). The circumstances of dismissal could seriously impair the professional reputations enjoyed by the appellants. Suspension and dismissal triggered by "conduct unbecoming a teacher" constitute potent condemnation, and could well jeopardize the employment opportunities of the appellants outside the Boston district. The interests of an individual in his professional reputation and in effective access to the practice of his chosen profession have carried great weight in the due process balance. See, e.g., *Birnbaum* v. *Trussell*, 371 F.2d 672 (2d Cir. 1966); *Meredith* v. *Allen Cty. War Mem. Hosp. Com'n*, 397 F.2d 33 (6th Cir. 1968); and *Scott* v. *Macy*, 349 F.2d 182 (D.C. Cir. 1965). The effect of appellants' dismissals goes still further, and in fact approaches the circumstance in which an individual is excluded from his chosen profession. See *Greene* v. *McElroy*, 360 U.S. 474 (1959).

But beyond their great personal stake as committed teachers, the appellants in the case at bar had vital constitutional interests which could only be protected in the context of a hearing at which their basic procedural rights were respected. The appellants have alleged that their dismissal was in contravention of their right to free expression. Their complaint in this regard presents a specific instance of a general proposition: substantive constitutional guarantees are mere abstractions unless supported by the procedural opportunity to identify their violation. Recognition of this truism has been the explicit basis for the judicial extension of procedural rights to non-tenured teachers in the public employ: "Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non-retention is useless without procedural safeguards."

*Roth* v. *Board of Regents*, 310 F. Supp. 972, 979-80 (1970). See also, Van Alstyne *The Demise of Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1451 (1968).

It follows from this observation that the more constitutionally "sensitive"—that is, vulnerable to infringement of esteemed constitutional freedoms—a given regime is, the greater is the need to infuse that regime with the safeguards of due process. The school has been recognized to be a place where the cultivation and preservation of free expression assume an especially high priority. See *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967), and *Tinker* v. *Des Moines Community School Dist.*, 393 U.S. 503, 512 (1969).

In contrast, no consideration of weight militates against affording due process to non-tenured teachers in appellants' position. Surely the Committee has no cognizable interest in arbitrary dismissals or in infringing upon the First Amendment rights of the teachers under its direction. See *Roth* v. *Board of Regents*, *supra*, at 979. While considerations of flexible and frank teacher evaluation may weigh somewhat against the requirements of due process where the issue is the contract renewal of a non-tenured teacher, they have no bearing whatsoever on a situation like that in the case at bar, where the mid-term dismissal of teachers for specific acts of misconduct is undertaken.

In point of fact, most federal courts which have confronted the question have extended procedural rights to non-tenured public teachers, even where the issue has been the non-renewal of an annual contract. See, *Ferguson* v. *Thomas*, Dkt. No. 2-8227 (5th Cir. 1970); *Lucas* v. *Chap-*

*man*, Dkt. No. 27687 (5th Cir. 1970); *Sindermann* v. *Perry*, Dkt. No. 28372 (5th Cir. 1970); *Roth* v. *Bd. of Regents*, 310 F. Supp. 972 (W.D. Wis. 1970); *Gouge* v. *Joint School Dist. No. 1*, 310 F. Supp. 984 (W.D. Wisc. 1970); and *Orr* v. *Trinter*, C.A. No. 70-163 (S.D. Ohio 1970). And in *Lucia* v. *Duggan*, 303 F. Supp. 112 (D. Mass. 1969), a federal district court held that constitutional considerations required a school district operating under exactly the same statutory regime as that involved here to grant procedural due process prior to the dismissal of a teacher for alleged misconduct.

This view is not unanimous, however, and involves a conflict among the Circuits. See *Freeman* v. *Gould Special School Dist.*, 405 F.2d 1153 (8th Cir. 1969), cert. denied, 396 U.S. 843.

## II.

**Appellants' dismissal may well have been based upon activities which are protected by the First Amendment guarantees of free expression.**

The appellants, in the proceedings below, maintained that their summary dismissal constituted a denial of their right to free expression. In rejecting this claim, the Supreme Judicial Court of Massachusetts relied on the following "finding" of the trial Court:

> The petitioners, and each of them, were in favor of enlarged community control over the operations of the Gibson School and had evidenced this view in many different ways, including a letter to a newspaper (Exhibit 6) and a petition (Exhibit 10) and taking part

> in many meetings with members of the community espousing such views. I find the petitioners were not in any way penalized by the Committee for such views or for their exercise of their constitutional rights of free speech and association. None of the actions of the Committee hereinafter set forth were based in whole or in part thereon. Appendix, *infra*, p. 15a.

The most that this finding can be said to encompass—apart from a sweeping conclusion of law—is the factual proposition that the letter to the newspaper and petition of appellants were not the basis of their dismissal. Such a proposition by no means voids the appellants' First Amendment claim.

The trial court made other findings which, far from negating First Amendment objections to the dismissals, lend them weighty support. The court found that it was the action of leaving the Gibson School on September 5th which triggered the appellants' dismissal. Finding 26, Appendix, *infra*, p. 24a. That action, in the language of *United States* v. *O'Brien*, 391 U.S. 367, 381-82 (1968), clearly had both a "communicative" and "non-communicative" aspect. One may assume *arguendo*, that the Committee could dismiss the appellants on the stark basis of a willful refusal to meet their classes on a given day. Nevertheless, to the extent that it was the "communicative" aura of their conduct which motivated the Committee, their dismissal was unconstitutional. If the Committee objected primarily to the appellants' having openly sided with those who favored community control of the schools in this dramatic fashion, or was otherwise responding to the political context or implications of the walk-out and teach-in,

then the dismissal of appellants was in retaliation for the "communicative" aspect of their conduct and barred by the strictures of the First Amendment. If engendered by the unjustified absence of the appellants, the dismissal was arguably legitimate; if engendered by their presence elsewhere because of the community control controversy, it most certainly was not.

A school board may not penalize its teachers for speech activities, however critical of the board and its policies they may be. *Pickering* v. *Board of Education*, 391 U.S. 563 (1969). Neither can it seize upon the admixture of protected and non-protected activity as a means of striking out against that which is protected. To hold otherwise would be to reward deviousness in speech repression. See *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).

Far from negating the inference that the Committee dismissed appellants because of the political content and context of their acts on September 5th, the trial judge all but found this to be the case. In focusing upon the events of that day, the judge began by announcing that "[t]he unhappy events set forth above grew out of the lawless action of a group which went far beyond the outer limits of protest and dissent." This statement was followed by lengthy quotations from tracts on civil disobedience. These in turn are concluded by the following finding:

> "It is inescapably clear that the petitioners, and each of them, knowingly elected to turn their backs upon their public employer, the City of Boston, and to cast their lot with those seeking to disrupt the very school they were bound by contract to serve. They accomplished this purpose by absenting themselves from

> their assigned place of employment in defiance of their duty assignments made by their superiors in the School Department. Those who play with the matches of anarchy often burn their own fingers. Such is true in the case at bar as to the petitioners." See Appendix, *infra*, p. 24a.

In light of the trial judge's opinion, infused as it is with support for the claim that the Committee responded primarily to the political content of appellants' actions on September 5th, and absent any specification of charges, or hearing, or record of deliberations, it must be acknowledged that there is at least the very substantial likelihood that appellants' dismissal was in retaliation for constitutionally protected activity. Appellants are therefore entitled to a due process hearing before the school committee so that the grounds for their dismissal can be made explicit. See *Street* v. *New York*, 394 U.S. 576 (1969).

## III.

**The denial of procedural rights to non-tenured teachers denied appellants the equal protection of the laws.**

By distinguishing between tenured and non-tenured teachers in the granting of procedural rights, the Massachusetts legislature created a classification which violates the equal protection clause. The selective deprivation of constitutional rights intensifies the constitutional harm. Only "a *compelling* state interest" can justify a disparity of treatment involving a fundamental right like that of procedural fairness. See *Shapiro* v. *Thompson*, 394 U.S. 618, 638 (1969); see also, *Dandridge* v. *Williams*, 26 L. Ed.2d 491, 501, n. 16 (1970).

The only basis for treating tenured and non-tenured teachers differently proffered by the Court below was that teacher evaluation necessarily includes subtle and diffuse variables which do not readily reduce to "proof at a hearing or to review by the judiciary." Appendix *infra* at p. 10a. This argument may be of some force in the context of a decision by a school agency to rehire a non-tenured teacher at the end of his or her contractual term of a year. But where the action involved is a mid-term disciplinary dismissal or suspension predicated on a specific alleged malfeasance, this consideration is of no weight at all. No conceivable reason for depriving the non-tenured teacher of the procedural rights afforded the tenured teacher exists in such a situation.

## CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

MELVIN L. WULF
LAWRENCE G. SAGER
PETER TRAGUE
*American Civil Liberties Union Foundation*
156 Fifth Avenue
New York, N. Y. 10010

ROY A. HAMMER
73 Tremont Street
Boston, Massachusetts 02108

November 30, 1970

# APPENDIX

## COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, July 3, 1970.

IN THE CASE OF

ANNE DECANIO & others

*vs.*

SCHOOL COMMITTEE OF BOSTON

pending in the Superior Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.,—

Appeals dismissed.

BY THE COURT,

/s/ FREDERICK J. QUINLAN, CLERK.

July 3, 1970.

A true copy,

Attest:

FREDERICK J. QUINLAN
Clerk of the Supreme Judicial Court
for the Commonwealth
September 18, 1970.

BRIEF STATEMENT OF THE GROUNDS AND REASONS OF THE DECISION:

See opinion on file.

## Opinion of Supreme Judicial Court of Massachusetts

S-7314

ANNE DECANIO & others[1] *vs.* SCHOOL COMMITTEE OF BOSTON.

KIRK, J. This is a bill for declaratory relief under G. L. c. 231A brought by six public schoolteachers in Boston against the school committee. The bill contains prayers requesting that the dismissal of the plaintiffs by the school committee be vacated, that the court declare "the rights, duties and status of the . . . [plaintiffs] as employees of the Boston School System," and for other equitable relief. The plaintiffs appealed from what was in effect an order for decree.

The basic facts of the dispute are these. The six plaintiffs were employed by the school committee as teachers in the Boston public schools for the school year beginning September 1, 1968, and ending August 31, 1969. None of the plaintiffs was serving "at discretion" (i.e. "on tenure") as that term is defined in G. L. c. 71, § 41. Each of the six was assigned to the Christopher Gibson School (Gibson School), an elementary school in the Dorchester district of Boston. The number of pupils registered at the Gibson School for that year was approximately 400, of whom over ninety per cent were of the black race. The Gibson School had become the focal point of a controversy concerning the extent of direct community participation or control which should be exercised or allowed in the schools. On September 4, 1968, the first day of classes, a demonstra-

[1] Constance L. Egan, Sandra Fenton, Charna Heiko, Mary Ellen Smith, and Mary McDonough.

tion took place at the Gibson School, in which various persons not connected with the school (except that some appear to have been parents of children in the school) entered the school building and each classroom, claiming to be the new principal and school staff. On the next day, September 5, the demonstrators returned. Police had been stationed at the door of the school to prevent the entry of unauthorized persons. Some of the demonstrators went behind the school to the yard where the children were being assembled for the start of classes, and announced that there would be no school that day at the Gibson School. Almost all the children were then led by the demonstrators to the Robert Gould Shaw House, a community center. The six plaintiffs, without informing, consulting with, or obtaining the consent of the superiors at the school, accompanied the demonstrators and the children to the Shaw House (described as a "liberation school") and conducted their classes there for the entire day.

The plaintiffs reported to the Gibson School on the next morning, September 6, but were refused admittance. They were informed that they had been suspended for seven days by the superintendent of schools for unauthorized absence on September 5.[1] The plaintiffs continued to teach at the Shaw House, where a considerable number of students from the Gibson School were still being taught.

On September 6, the school committee notified the plaintiffs of a hearing "on your suspension" to be held on September 11. No additional notice of charges against the plaintiffs was given. The plaintiffs, who were represented

[1] The plaintiffs have waived any claim that this initial suspension was unlawful.

by counsel at the September 11 hearing, requested a continuance and a public hearing. The committee voted to terminate the plaintiffs' contracts effective thirty days after delivery of notice, and to suspend the plaintiffs for those thirty days for "conduct unbecoming teachers." The committee also voted to give the plaintiffs a closed hearing on September 25. The plaintiffs declined to attend that hearing and instead instituted this suit. The judge ruled that the plaintiffs, as probationary teachers not serving at the discretion of the school committee, had no statutory or constitutional right to a hearing.[4] The order for decree declared that the plaintiffs "were properly and lawfully dismissed from their employment as teachers by the . . . School Committee . . . on September 11, 1968, and are not entitled to reinstatement as teachers in the School Department of the City of Boston."

1. We are faced at the outset with a jurisdictional question not raised by the parties. No final decree was entered in the Superior Court. It is settled that an appeal from an order for decree has no standing. G. L. c. 214, § 19. *Carilli* v. *Hersey*, 303 Mass. 82, 87. *Moodie* v. *Jenks*, 329 Mass. 332. *Galvin* v. *Bay State Harness Horse Racing & Breeding Assn. Inc.*, 343 Mass. 520, 522. See *George R. Whitten, Jr. Inc.* v. *County Commrs. of Essex*, 352 Mass. 579, 580-581. Since no bill of exceptions was filed or allowed, the plaintiffs' exceptions are not open to review. G. L. c. 231, § 113. *Sullivan* v. *Roche*, 257 Mass. 166, 170.

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[4] Because of the lack of notice of the specific charges against the plaintiffs, the judge did not treat the plaintiffs' refusal to attend the offered hearing on September 25 as a waiver of the right to a hearing.

*Bourget* v. *Holmes*, 297 Mass. 25, 26, 27. *Joyce* v. *Hickey*, 337 Mass. 118, 119. The issues, however, have been fully argued. There are presented questions of great importance both to the plaintiffs, who understandably desire a speedy determination of their status, and to the public. We therefore deem it advisable to express our opinion on the issues. See *Wellesley College* v. *Attorney Gen.*, 313 Mass. 722, 731; *Gallagher* v. *Board of Appeals of Falmouth*, 351 Mass. 410, 415; *Metropolitan Dist. Commn.* v. *Department of Pub. Util.*, 352 Mass. 18, 27; *City Manager of Medford* v. *State Labor Relations Commn.*, 353 Mass. 519, 524; *Beaton, petitioner*, 354 Mass. 670, 672.

2. The plaintiffs' first contention is that they were entitled to a hearing on their suspension and dismissal under the provisions of G. L. c. 71, § 41, as amended through St. 1956, c. 132, § 1, which provides in relevant part: "Every school committee, in electing a teacher or superintendent, who has served in its public schools for the three previous consecutive school years, . . . shall employ him to serve at its discretion . . . . A teacher or superintendent not serving at discretion shall be notified in writing on or before April fifteenth whenever such person is not to be employed for the following school year. Unless said notice is given as herein provided, a teacher or superintendent not serving at discretion shall be deemed to be appointed for the following school year." The plaintiffs argue that the last two sentences of § 41 establish a special status for teachers who are "not serving at discretion" but are "deemed to be appointed for the following school year." Each of the plaintiffs had been employed by the school committee in the previous school year. None was notified

by April 15, 1968, that she was not to be employed for the next school year. The plaintiffs argue that, since they were "deemed to . . . [have been] appointed" for the 1968-1969 school year, the school committee did not have the authority to suspend or discharge them summarily.

The plaintiffs' argument lacks merit. It was long "the law that a school committee could discharge a teacher at any time. St. 1844, c. 32. *Knowles* v. *Boston*, 12 Gray, 339. The changes made by . . . [G. L. c. 71, §§ 41, 42] in securing permanency of tenure and requiring certain procedure for a valid discharge relate only to teachers who are 'on tenure,' and do not apply to one employed for a single year." *Pulvino* v. *Yarmouth*, 286 Mass. 21, 24. See *Nester* v. *School Comm. of Fall River*, 318 Mass. 538. The last sentence of § 41 was added by St. 1953, c. 372. That sentence does not purport to grant any new rights to a hearing, or to establish any intermediary status between "tenure" and "nontenure" teachers. It provides merely that the absence of notice to the contrary by April 15 constitutes an election (see G. L. c. 71, § 38) of the teacher for the following year. When taken together with the preceding sentence, its effect is to relieve the school committee of the burden of notifying every nontenure teacher of his reappointment, and also to afford those teachers who are not reappointed adequate opportunity to make plans. There is no express abridgment of the power of the school committee to dismiss or suspend during the school year a teacher who has been elected but is not serving "at discretion." "Where in the past the Legislature has limited the powers of school committees it has done so in express terms (G. L. [Ter. Ed.] c. 71, §§ 38-45), and it is to be expected that a radical departure from such previous policy would

be expressed in clear language and not left to doubtful implication." *Davis* v. *School Comm. of Somerville*, 307 Mass. 354, 363. *O'Donnell* v. *Norwood*, 346 Mass. 394, 397.

3. The plaintiffs' principal contention is that their suspension and dismissal, without adequate notice of the charges against them and a prior hearing, deprived them of due process and equal protection of the laws. The gist of the argument is that a governmental agency may not constitutionally discharge *any* employee, regardless of his probationary status, without first providing him an opportunity to be heard; and that G. L. c. 71, §§ 42 and 42D, which grant the right to a hearing on discharge or suspension only to teachers on tenure, deny probationary or nontenure teachers the equal protection of the laws.

The plaintiffs cite in support of their argument a number of cases which hold that before a regulatory agency may deny a person permission to engage in a lawful occupation the agency must afford that person the opportunity for a hearing.[4] We think those cases are inapposite. What is concerned here is not an "interference with such persons' freedom of employment and business activity." *Milligan* v. *Board of Registration in Pharmacy*, 348 Mass. 491, 498. Rather it is the decision by an employer whether to continue the services of an employee who is on a probationary basis. See *Willner* v. *Committee on Character & Fitness*, 373 U. S. 96, 103 and fn. 2. See also *Cafeteria & Restaurant Wkrs. Union, Local 473* v. *McElroy*, 367 U. S. 886, 896; *Gard-*

[4] *Milligan* v. *Board of Registration in Pharmacy*, 348 Mass. 491 (right to operate pharmacy). *Goldsmith* v. *United States Bd. of Tax Appeals*, 270 U. S. 117 (right to practise accounting). *Schware* v. *Board of Bar Examrs.*, 353 U. S. 232. *Willner* v. *Committee on Character & Fitness*, 373 U. S. 96 (right to practise law).

*ner* v. *Broderick*, 392 U. S. 273, 277-278. Most of the cases in which the question has been considered have concluded that in the absence of a statute to the contrary a probationary teacher may be dismissed without a hearing. See, e.g., *Brooks* v. *School Dist. of Moberley, Mo.*, 267 F. 2d 733, 739 (8th Cir.), cert. den. 361 U. S. 894; *People ex rel. Fursman* v. *Chicago*, 278 Ill. 318, 325-362; *People ex rel. Thomas* v. *Board of Educ. of Chicago*, 40 Ill. App. 2d 308; *Zimmerman* v. *Board of Educ. of Newark*, 38 N. J. 65, 69-70; *Albury* v. *New York City Civil Serv. Commn.*, 32 App. Div. 2d (N. Y.) 895, and cases cited; *Rees* v. *Murray City Bd. of Educ.*, 6 Utah 2d 196. See also *Parker* v. *Board of Educ. of Prince George's County, Md.*, 237 F. Supp. 222, 227 (D. Md.), and cases cited at fn. 5, affd. 348 F. 2d 464 (4th Cir.), cert. den. 382 U. S. 1030; 78 C. J. S., Schools and School Districts, § 204, at fn. 42. Cases from other States which the plaintiffs cite were concerned with statutes markedly different from G. L. c. 71, §§ 41, 42, 42D.[8] The plaintiffs have cited only three cases which held that a probationary teacher was constitutionally entitled to a hearing. The court in *Lucia* v. *Duggan*, 303 F. Supp. 112 (D. Mass.), reviewed the dismissal of a probationary teacher by a school committee in this Commonwealth. The plaintiff in that case had been dismissed for insubordination owing to his refusal to shave his beard, and for his conduct at a hearing before the school committee. The District Court refused to declare G. L. c. 71, §§ 42 and 42D, unconstitutional as denying nontenure teachers equal protection, because "[t]here are valid reasons for treating the probationary teacher differently from the permanent teacher."

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[8] *Johnson* v. *Board of Educ.*, 101 Ariz. 268. *School Dist. No. 1* v. *Thompson*, 121 Colo. 275. *Kuehn* v. *School Dist. No. 70*, 221 Minn. 443.

*Id.* at p. 119, fn. 5. The court further refused to hold that the plaintiff had a constitutional right to wear a beard. *Id.* at 117. Nevertheless, the court ruled that wearing a beard was "at least an interest of his . . . which may not be taken from him without due process of law." *Id.* at 118. Since the hearing given the plaintiff by the school committee had elements of both a rule-making and adjudicatory proceeding, it was held to be lacking in due process.

In *Roth* v. *Board of Regents of State Colleges*, 310 F. Supp. 972 (W. D. Wis.), and later in *Gouge* v. *Joint Sch. Dist. No. 1*, 310 F. Supp. 984 (W. D. Wis.), a United States District Court judge in Wisconsin held that under his interpretation of the holding of *Cafeteria & Restaurant Wkrs. Union, Local 473* v. *McElroy*, 367 U. S. 886, a public school teacher or college professor, whether or not on tenure, cannot constitutionally be dismissed without notification of the reasons for the impending dismissal and the offer of a hearing. The gravamen of the holding in the *Roth* case was that "the decision not to retain a professor employed by a state university [or a teacher in a public elementary or secondary school as in the *Gouge* case] may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason," 310 F. Supp. at p. 979, and that given the requirement of a reason, the professor or teacher must be afforded the opportunity to contest its basis. *Id.* at p. 980.

We are unsure of the precise constitutional basis for the holding of the District Court in the *Lucia* case. Nor are we persuaded by the reasoning of the court in the *Roth* and *Gouge* cases. As the opinion in the *Roth* case recognized, "it is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer or

one who has not yet won sufficient respect from his colleagues." 310 F. Supp. at pp. 978-979. Such reasons are not amenable to proof at a hearing or to review by the judiciary. We therefore choose to follow the greater weight of authority. We note, however, that in the instant case the judge found, on sufficient evidence, that the school committee terminated the contracts of the six plaintiffs because of their leaving the Gibson School on September 5, 1968, and that the plaintiffs "were not in any way penalized by the [c]ommittee" on account of their views on community control of or participation in the direction of the school system. Cf. *Wieman* v. *Updegraff*, 344 U. S. 183; *Slochower* v. *Board of Higher Educ. of New York City*, 350 U. S. 551; *Keyishian* v. *Board of Regents*, 385 U. S. 589; *Pickering* v. *Board of Educ.*, 391 U. S. 563.

We conclude that in providing for a hearing before dismissal or suspension of a teacher on tenure, but not for that of a probationary teacher, G. L. c. 71, §§ 42 and 42D, violate no provision of either the Constitution of the United States or the Constitution of Massachusetts. "[T]he interest of a government employee in retaining his job can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." *Cafeteria & Restaurant Wkrs. Union, Local 473* v. *McElroy*, 367 U. S. 886, 896. *Vitarelli* v. *Seaton*, 359 U. S. 535, 539. See *Nostrand* v. *Little*, 58 Wash. 2d 111, 123, appeal dism. 368 U. S. 436. In *Nelson* v. *County of Los Angeles*, 362 U. S. 1, a temporary county employee was discharged without a hearing for his refusal, in violation of State law, to answer questions before a congressional subcommittee. The Supreme Court held that it was bound by the California

court's interpretation that State law permitted summary discharge in such circumstances. *Id.* at p. 6. The Court further held that the summary discharge did not violate the employee's rights under the Fifth Amendment. *Id.* at pp. 6-7. Dissenting from this latter holding, Justice Brennan conceded that, "Doubtless a probationary employee can constitutionally be discharged without specification of reasons at all; and this Court has not held that it would offend the Due Process Clause, without more, for a State to put its entire civil service on such a basis . . . ." *Id.* at p. 16.

In the case before us the Legislature chose to allow a school committee three years to evaluate the performance of a teacher before the teacher would be deemed to have proved his competence and would thenceforth be subject to dismissal only for the causes set forth in G. L. c. 71, § 42. "Manifestly one of the most important duties involved in the management of a school system is the choosing and keeping of proper and competent teachers. The success of a school system depends largely on the character and ability of the teachers. Unless a school committee has authority to employ and discharge teachers it would be difficult to perform properly its duty of managing a school system. The statutory power of a school committee to discharge teachers has always been freely construed." *Davis* v. *School Comm. of Somerville*, 307 Mass. 354, 362. "The Legislature, moved by obvious and strong reasons, has vested the school committee with the absolute and unconditional power to agree with teachers upon their salaries to the end that high standards may be secured and maintained in the education of the youth of the Commonwealth." *Leonard* v. *School Comm. of Springfield*, 241 Mass. 325, 329-330. Moved by those same strong reasons, the Legisla-

ture chose also "to provide some degree of protection for the tenure of teachers who have served a probationary term of three consecutive school years and who are continued in employment thereafter." *Frye* v. *School Comm. of Leicester*, 300 Mass. 537, 538-539. In doing so it has abridged no constitutional right of a probationary teacher.

4. The plaintiffs contend that certain of the findings of the judge were unsupported by or contrary to the evidence. We agree that the evidence does not support the judge's finding that the plaintiffs learned on the evening of September 4, 1968, of a plan to lead the children to the Shaw House the next day. The evidence shows, rather, that the plaintiffs attended a meeting on September 4 at which were present some or all of the demonstrators who had entered the Gibson School that day; that plans were made at the meeting for the demonstrators to return to the Gibson School the next day; that on the morning of September 5, when school officials were standing at the front door, three of the plaintiffs entered the school yard by means of the fire escape; that before the children were led away at least one of the plaintiffs had frequent contact with the demonstrators standing near the front door; and that another of the plaintiffs actively participated in assembling the children and leading them to the Shaw House. The discrepancy between the findings and the evidence is harmless. Whether the plaintiffs knew of the plan the day before it was executed, whether they learned of it only minutes before, or indeed whether they joined in the plan on the spur of the moment is immaterial to the issue whether, as probationary teachers, they were entitled to a hearing.

5. The plaintiffs contend that the judge erred in excluding testimony of an expert witness. The offered testimony was to the effect that suspension and dismissal of probationary teachers without a hearing "would have no legitimate educational purpose." As we construe the testimony, it amounts to a conclusion on the ultimate issue whether G. L. c. 71, §§ 42 and 42D, are patently arbitrary. That was a question for the judge. See *Paddock* v. *Brookline*, 347 Mass. 230, 232; *Coffee-Rich, Inc.* v. *Commissioner of Pub. Health*, 348 Mass. 414.

6. We conclude that the plaintiffs were lawfully suspended and their contracts lawfully terminated by the school committee of Boston, and that the plaintiffs are not entitled to reinstatement as teachers.

*Appeals dismissed.*

## Findings, Rulings and Order for Declaratory Judgment of Superior Court

This is a petition for declaratory judgment arising out of the dismissal of six non-tenure teachers without a hearing by the respondent members of the Boston School Committee (Committee).

Upon all the evidence, I make the following findings, rulings and Order for Declaratory Judgment:

1. Each of the petitioners had a written contract with the Committee to teach in the Boston public schools during the school year beginning September 1, 1968, and ending August 31, 1969. Such contracts (Exhibits 3A-3F) are summarized in Appendix A hereto. Those contracts executed before 1968 were applicable to such school year, since they were renewed from year to year in the absence of notice to the contrary.

2. None of the petitioners had achieved tenure as provided by General Laws, Chapter 71, or otherwise.

3. Each contract provided, in material part:

> "This contract may be terminated by either party upon thirty (30) days' notice, said notice to be delivered by certified mail, return receipt requested." *

4. Each of the petitioners was properly assigned to teach at the Christopher Gibson (Gibson) School in the Dorchester district of the City of Boston. The opening day of school for pupils was Wednesday, September 4, 1968.

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* Five (5) days in the case of petitioner Fenton.

5. The pupil registration of the Gibson School is approximately four hundred in number, of which substantially all—well over ninety per cent—are black children. The Gibson School (a grammar school) was a focal point of controversy concerning the question of community control of or participation in the operation of the public schools. This complex matter is a crucial issue in many of the large cities in the nation. It involves racial, social and political questions which are not, I repeat—are not—before this Court for determination or comment as to the merits of one side or the other.

6. The petitioners, and each of them, were in favor of enlarged community control over the operations of the Gibson School and had evidenced this view in many different ways, including a letter to a newspaper (Exhibit 6) and a petition (Exhibit 10) and taking part in many meetings with members of the community espousing such views. I find the petitioners were not in any way penalized by the Committee for such views or for their exercise of their constitutional rights of free speech and association. None of the actions of the Committee hereinafter set forth were based in whole or in part thereon.

7. Each of the petitioners reported for duty at the Gibson School on Wednesday, September 4, 1968.

8. On that morning there was a substantial number of non-school personnel in the school building and its environs for the purpose of imposing upon the Gibson School, by unlawful force and violence, their views as how the teaching of the children should be conducted and by whom, for the avowed objective of exercising community control. Their activities included physical occupation of the school building with a self-appointed school staff in place of the

duly appointed school staff. Each classroom was invaded in pursuance of this plan. Additionally, a number of men isolated the newly appointed woman principal, Mary McLaughlin, in her office. By crowding her office and by intimidation and threats, they tried to force her to leave her position as principal in favor of one of the would-be usurpers of authority. Despite the harrowing circumstances, she courageously refused to yield to the lawless pressure of her tormenters. The attempt to take over the Gibson School by mob action failed.

9. The petitioners did not take part in the events described in the preceding paragraph, but it is the backdrop against which their actions took place on the following day.

10. On the evening of Wednesday, September 4, 1968, the petitioners and others, including the leaders of the events described in paragraph 8, attended a local community meeting called to consider the Gibson situation (Exhibit 19). At that meeting the group prepared and completed a plan to lead a walkout of children from the Gibson School to a self-styled liberation school a few blocks away at the Robert Gould Shaw House (Shaw), a community center. The plan was to be executed the following day. The petitioners denied their presence at that part of the meeting and denied knowledge of such a plan. I disbelieve the petitioners. I draw the inference and find that each did in fact know of such plan and was fully aware of it and part of it on Wednesday evening, September 4, 1968, and thereafter.

11. On the morning of Thursday, September 5, 1968, the petitioners reported for duty at the Gibson School.

12. Various non-school personnel, including the leaders of the events set out in paragraphs 8 and 10, were present

at the Gibson School that morning. Chief among them were one Alfred Smith (Smith), an official of a Federally-funded (U. S. Department of Labor and U. S. Department of Health, Education and Welfare) project known as the Multi-Service Center—and one Benjamin Scott. They took the lead in disrupting entirely the operations of the Gibson School that day. Scott announced that he was the school principal. Smith, Scott and many others, acting as modern Pied Pipers of disruption, ordered and led between 300 and 325 of the school children away from the Gibson School and its environs and to the Shaw House, as planned. They thereupon set up and operated on September 5, and for some days thereafter, a school self-described as a "Liberation School."

13. On the morning of September 5, 1968, each of the petitioners, without consulting, obtaining the approval of, or informing any of their superiors at the Gibson School

or, indeed, within the Boston school system, freely, voluntarily, wilfully and intentionally left the Gibson School, to which they had been assigned by their superiors in the school system, and proceeded to the "Liberation School," where they assumed the role of teachers to those children who should have been in their respective classrooms at the Gibson School. Each was paid for her services at the Shaw House. The Shaw House school was not licensed or approved as such by any governmental agency.

14. The children thus lured away from the Gibson School were between the ages of six and ten. One of the suggested themes handed out to the petitioners and others at the Shaw House Exhibit 10, which included the following:

> "*Four Fundamental Themes for First Days of School*
> "*Change and Revolution* . . .
>
> "Projects:
>
> "(1) discuss connection between *revolution* and *evolution,* giving history of some important revolutions, explaining why they took place (to obtain some rights which the ordinary people should have had), discuss John F. Kennedy's statement about revolution: 'Those who make peaceful revolution impossible make violent revolution inevitable.' Examples, French Revolution, Mao's revolution in China, Civil Rights movement in general.
>
> "(2) discuss revolutionary tactics: peaceful means; simple marxist approach, the underground movement, infiltration of positions of power, party line, general strike, seizure of key places of power."

The petitioners denied knowledge of the preparation of these materials or the teaching of them. The evidence is insufficient to find otherwise.

15. Each of the petitioners explained her action by asserting her primary duty was to teach the children and that if this duty conflicted with her duties to her public employer, the Boston School Department, the latter must take second place.

16. The petitioners reported to the Gibson School for duty the following morning, Friday, September 6, 1968, but were refused admittance. All were informed they had been suspended for a period of seven days by the Superintendent of Schools for unauthorized absence on September 5. (See exhibit 8.) The petitioners have waived any claim such suspension was not lawful. The petitioners thereafter continued to teach at the Shaw House.

17. On September 6, 1968, each of the petitioners was notified by letter (Exhibit 5) of a hearing on "your suspension" to be held at 3:00 p.m. on September 11, 1968, at Committee Headquarters. No additional notice of charges against the petitioners was ever given by the Committee to any of them.

18. Each of the petitioners was represented by counsel before the meeting of the Committee on September 11, 1968, at which time each demanded a continuance of the hearing, and each demanded a public hearing.

19. On September 11, 1968, the Committee, by a vote of four to one, voted as follows:

"Ordered: That the contracts of employment with Anne Hooker DeCanio, Constance L. Egan, Sandra Thompson Fenton, Charna Heiko, Mary F. McDonough, and Mary Ellen Smith as teachers in the public schools of the city of Boston be and the same hereby are terminated by this Committee effective thirty days after delivery of notice of such termination; and be it further ordered that the Secretary of this Committee be and he hereby is authorized and directed to send forthwith in the name and in behalf of this Committee by certified mail, return receipt requested, to each of said teachers a notice in the following form:

Dear Madam:

"As expressly permitted by the terms of your contract of employment as a teacher in the public schools of the city of Boston, you are hereby notified that said contract is being terminated by the School Committee of the city of Boston, effective thirty days after delivery of this notice.

Yours very truly,

School Committee of the
city of Boston,
by the Secretary."

20. On September 11, 1968, the Committee, by a vote of four to one, voted as follows:

"Ordered: that Anne Hooker DeCanio, Constance L. Egan, Sandra Thompson Fenton, Charna Heiko, Mary F. McDonough, and Mary Ellen Smith be and hereby are suspended as teachers in the Boston public schools

for one month effective September 12, 1968, for conduct unbecoming teachers, and further ordered that the Secretary of the School Committee be authorized and directed to send forthwith notice of this action to each of said teachers by certified mail, return receipt requested."

21. The petitioners stipulated that each of them duly received proper notices of each of the two foregoing votes. (See Exhibits 12, 11A to 11F, and Exhibits 9, 13A-13E.)

22. On September 11, 1968, the Committee, by a further vote of four to one, voted to give the petitioners a closed hearing (rather than an open public hearing) at 1:00 p.m. on September 25, 1968. The petitioners declined to attend such hearing and instituted these proceedings.

23. The unhappy events set forth above grew out of the lawless action of a group which went far beyond the outer limits of protest and dissent. It was in complete defiance of the rule of law upon which depends the liberties of all of us, minority and majority, of every race, sect and creed. These outer limits were recently spelled out by Mr. Justice Abe Fortas of the United States Supreme Court in his work, CONCERNING DISSENT AND CIVIL DISOBEDIENCE.* His words bear study. Justice Fortas said:

"*This is the rule of law.* The state, the courts, and the individual citizen are bound by a set of laws which have been adopted in a prescribed manner, and the state and the individual must accept the courts' determinations of what those rules are and mean in

* The New American Library, 1968. Library of Congress Catalog Card #68-30685.

specific instances. *This is the rule of law*, even if the ultimate judicial decision is by the narrow margin of five to four! . . .

"The phrase 'civil disobedience' has been grossly misapplied in recent years. Civil disobedience, even in its broadest sense, does not apply to efforts to overthrow the government or to seize control of areas or parts of it by force, or by the use of violence to compel the government to grant a measure of autonomy to part of its population. These are programs of revolution. . . .

". . . But they are not protected in the use of violence. Programs of this sort, if they are pursued, call for law enforcement by police action. . . .

"Let me first be clear about a fundamental proposition. The motive of civil disobedience, whatever its type, does not confer immunity for law violation. Especially if the civil disobedience involves violence or a breach of public order prohibited by statute or ordinance, it is the state's duty to arrest the dissident. . . .

"He may be motivated by the highest moral principles. He may be passionately inspired. He may, indeed, be right in the eyes of history or morality or philosophy. These are not controlling. It is the state's duty to arrest and punish those who violate the laws designed to protect private safety and public order. . . .

"We are a government and a people under law. It is not merely *government* that must live under law. Each of us must live under law. Just as our form of life depends upon the government's subordination to law

under the Constitution, so it also depends upon the individual's subservience to the laws duly prescribed. Both of these are essential.

"Just as we expect the government to be bound by all laws, so each individual is bound by all of the laws under the Constitution. He cannot pick and choose. He cannot substitute his own judgment or passion, however noble, for the rules of law. . . . *A citizen cannot demand of his government or of other people obedience to the law, and at the same time claim a right in himself to break it by lawless conduct, free of punishment or penalty.* (Emphasis supplied)

"Some propagandists seem to think that people who violate the laws of public order ought not to be arrested and punished if their violation has protest as its purpose. By calling the criminal acts 'civil disobedience,' they seek to persuade us that offenses against public and private security should be immune from punishment and even commended. They seek to excuse physical attacks upon police; assaults upon recruiters for munitions firms and for the armed services; breaking windows in the Pentagon and in private stores and homes; robbing stores; trespassing on private and official premises; occupying academic offices; and even pillaging, looting, burning and promiscuous violence.

"We are urged to accept these as part of the First Amendment freedoms. We are asked to agree that freedom to speak and write, to protest and persuade, and to assemble provides a sanctuary for this sort of conduct. But that is nonsense."

24. As was said by Earl F. Morris, Esq., of the American Bar Association:*

> "Amid cries of 'protest', we see coercion. Amid shouts of 'dissent', we see disorder. What the persons who participate in these lawless acts seem to have forgotten is that, though their techniques might be effective for the moment, they are self-defeating because they imperil the same individual freedom they are intended to promote . . . Nathan Pusey, President of Harvard University, said they are in danger of becoming '. . . so carried away by their conviction about the rightness of their cause and so impatient with civilized procedures that they seek to restrain the freedom of expression or movement of others who may not agree with them.'
>
> "The concept of civil disobedience has been distorted in these times to justify violence and anarchy. . . .
>
> ". . . the law is and must be the supreme factor in the orderly working of society and that order, without which religion, education and civil rights cannot live, can be maintained only by adherence to the law . . . .
>
> "In our society the rule of law serves as the basis for all social action . . . The rule of law prohibits private, personal vengeance and imposes restraints on each of us, and by so doing it maintains a state of order that makes progress—for the individual as well as for society—possible. . . .

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* American Bar Association Journal, Vol. 54, July 1968, pp. 656, 657.

". . . each of us must comply with the law if we are to have an ordered society in which rights and responsibilities are concomitant. An ordered society cannot survive—and ours, strong as it is, will not survive—if each individual may determine which laws he will obey and with impunity flout those he finds distasteful. . . ."

25. It is inescapably clear that the petitioners, and each of them, knowingly elected to turn their backs upon their public employer, the City of Boston, and to cast their lot with those seeking to disrupt the very school they were bound by contract to serve. They accomplished this purpose by absenting themselves from their assigned place of employment in defiance of their duty assignments made by their superiors in the School Department. Those who play with the matches of anarchy often burn their own fingers. Such is true in the case at bar as to the petitioners.

26. I find that the Committee terminated the petitioners' contracts because of their action in so leaving the Gibson School on September 5, 1968.

## Rulings

27. I rule that the conduct of the petitioners, and each of them, in leaving the Gibson School premises on September 5, 1968, was a wilful and material breach of their respective contracts with the Committee.

28. I rule that the petitioners, and each of them, are not entitled to a public hearing by the Committee with respect to their suspension or discharge.

29. I rule that the petitioners, and each of them, are not entitled to a hearing by the Committee with respect to their suspension or discharge.

30. I rule that General Laws, Chapter 71, Sections 42 et al., do not grant the right to a hearing to the petitioners on suspension or discharge.

31. I rule that Chapter 71, Sections 42 and 42D, providing for hearings for tenure teachers but not for non-tenure teachers, does not, either as written or as applied in the case at bar, offend any of the provisions of the Constitution of the United States or the Constitution of the Commonwealth of Massachusetts.

32. I rule that termination of petitioners' contracts by vote of the Committee on September 11, 1968, was lawful and proper.

33. I rule that the suspension of the petitioners for a period of thirty days by vote of the Committee on September 11, 1968, was lawful and proper.

34. Moreover, and in any event, I find and rule that each of the petitioners wilfully, voluntarily and intentionally breached her contract with the Committee by leaving the Gibson School premises without authority on September 5; that this was a material breach; and that this was justification for the Committee to terminate the contracts and each of them forthwith on September 11, 1968, as a matter of contract law, quite apart from the provisions of statutory law.

35. I find and rule that there is no justiciable controversy presented with respect to the rights of the petitioners under and by virtue of a union contract between the Committee and the Boston Teachers Union, Local 66, AFL-CIO (see Exhibits 2 and 17), and I decline to issue any declaratory judgment with respect thereto, noting, *Inter alia*, that few of the petitioners are members of the Union and that the petition fails to include the Union as a party herein.

ORDER FOR DECLARATORY JUDGMENT

36. The Clerk is directed to enter the following judgment herein:

> "It is ORDERED, ADJUDGED AND DECREED that the petitioners, and each of them, were properly and lawfully dismissed from their employment as teachers by the respondent School Committee of Boston on September 11, 1968, and are not entitled to reinstatement as teachers in the School Department of the City of Boston."

JOSEPH FORD
Justice of the Superior Court

## Notice of Appeal Filed September 30, 1970

IN THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

No. 7314

ANNE DECANIO & Others,

*Appellant,*

—VS.—

SCHOOL COMMITTEE OF BOSTON,

*Appellee.*

Notice is hereby given that Sandra Fenton, Charno Heiko, Mary Ellen Smith and Mary McDonough, four of the six appellants* in the above captioned action, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts, dismissing the appeals, entered in this action on July 3, 1970.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

LAWRENCE D. SHUBOW
Allen, Hemingway, Morse & Shubow
15 Court Square
Boston, Massachusetts 02108
*Counsel for Appellants*

* Anne DeCanio and Constance L. Egan, the remaining two appellants, do not join in this present Notice of Appeal.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

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No. 1026

---

SANDRA FENTON, ET AL., *Appellants*,

v.

BOSTON SCHOOL COMMITTEE, *Appellee*.

---

On Appeal from the Supreme Judicial Court of Massachusetts

---

## MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE A MEMORANDUM AS AMICUS CURIAE

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*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Now comes the National Education Association (NEA) and respectfully moves this Court, pursuant to Rule 42, paragraph 3, of the Rules of this Court,

for leave to file the accompanying memorandum as amicus curiae.

The interest of the NEA and its reasons for requesting leave to file a memorandum as *amicus curiae* are set forth in the accompanying memorandum.

Respectfully submitted,

DAVID RUBIN
*Deputy General Counsel*
National Education Association
1201 16th Street, N. W.
Washington, D. C. 20036
202/833-4451

RICHARD J. MEDALIE
ALVIN FRIEDMAN
EPSTEIN, FRIEDMAN AND DUNCAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036
202/628-7234

*Attorneys for the National Education Association*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1026

SANDRA FENTON, ET AL., *Appellants*,

v.

BOSTON SCHOOL COMMITTEE, *Appellee*.

On Appeal from the Supreme Judicial Court of Massachusetts

## MEMORANDUM OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE

### INTRODUCTION

The National Education Association (NEA), upon motion, seeks to appear as *amicus curiae* in the present case.

A letter from counsel for appellants consenting to NEA's participation as *amicus curiae* has been filed with the Clerk of this Court. Counsel for appellees have not consented to NEA's participation as *amicus curiae*, however.

NEA appears in this Court at the present stage of the proceedings to urge plenary consideration of this case on the issue whether the rights of nontenured teachers to procedural due process under the Fourteenth Amendment are violated when a public educational institution, in dismissing the teachers during their contract term, fails to provide the teachers with notice and the opportunity for a hearing.

## INTEREST OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE AND ITS REASONS FOR REQUESTING LEAVE TO FILE

NEA was founded in 1857 and chartered as a nonprofit corporation by act of Congress in 1906. Its membership includes more than one million professional educators, many of whom are nontenured teachers. Its charter purpose is to improve the character and advance the interest of the teaching profession and the cause of education in the United States.

Several years ago, NEA established a fund for the protection of teacher rights, known as the "DuShane Fund," through which it has supported cases across the nation, raising issues which are the same as, or similar to, those raised in the present case. NEA has thus gained special background, experience and competence which it desires to bring to bear on the procedural due process issue raised here.

There is now pending before this Court a motion by NEA for leave to file a brief as *amicus curiae* in *Perry* v. *Sindermann*, No. 952, O.T. 1970, a case raising a closely related procedural due process issue. NEA appeared as *amicus curiae* before the Fifth Circuit in the *Perry* case. *Sindermann* v. *Perry*, 430 F.2d 939 (1970). NEA has also appeared as *amicus curiae* before this Court in *Jones* v. *Hopper*, 397 U.S. 991 (1970), *denying cert.*, 410 F.2d 1323 (10th Cir. 1969), and in a number of cases currently pending on appeal in other federal courts of appeals, which, although involving different facts, raise legal issues comparable to those presented here. See *Drown* v. *Portsmouth School Dist.*, Dkt. No. 7667, 1st Cir.;[1]

[1] The First Circuit decided the *Drown* case on December 18, 1970. NEA has not yet obtained a copy of the opinion, however.

*Orr* v. *Trinter*, Dkt. No. 20721, 6th Cir.; *Roth* v. *Board of Regents*, Dkt. No. 18490, 7th Cir.

For the foregoing reasons, NEA requests leave to appear as *amicus curiae*.

## REASONS FOR PLENARY CONSIDERATION

1. Although the present case is before this Court on appeal by virtue of the lower court's determination that the Massachusetts Teacher Dismissal Statute does not violate any provision of the United States Constitution (*see* Jur. St. App. 10a),[2] the more basic issue decided by the Supreme Judicial Court of Massachusetts and raised in the appeal papers is whether notice and hearing are required under the due process clause of the Fourteenth Amendment when a public educational institution *undertakes to dismiss a nontenured teacher during his contract term*. This issue is closely related to the question whether such notice and hearing are required when the public educational institution, rather than dismissing the nontenured teacher, *refuses to renew his contract for the next academic year*.[3] The latter issue is now pending on

[2] "Jur. St." refers to the Jurisdictional Statement, and "Jur. St. App." refers to the Appendix in the Jurisdictional Statement.

[3] NEA believes that the distinction between dismissal and contract nonrenewal cases is one without a difference. As stated by the Rhode Island Commissioner of Education in Domenicone v. School Committee of Smithfield, May 20, 1970, at 3, 4 (unreported):

> "We believe that a 'dismissal during a school year' and a 'decision not to renew a contract for the ensuing year' are in each instance in fact a dismissal . . ., and that the only difference between the two is the point in time at which termination of service occurs . . . .
>
> "[D]ismissal . . ., whether it be during a school year or at the end of a school year can mean the end of [the teacher's] professional career."

a Petition for a Writ of Certiorari before this Court in *Perry* v. *Sindermann*, No. 952, O.T. 1970. In view of the similarity of the issues presented, NEA urges that the present case be set for plenary consideration jointly with the *Perry* case.

2. The decision of the Supreme Judicial Court of Massachusetts is in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Ferguson* v. *Thomas*, 430 F.2d 852 (1970), which requires a public educational institution to grant a due process hearing to a nontenured teacher whose employment it wishes to terminate. The decision below also is in conflict with the Fifth Circuit's decision in *Sindermann* v. *Perry*, 430 F.2d 939 (1970), *petition for a writ of certiorari filed*, No. 952, Sup. Ct., O.T. 1970, Nov. 9, 1970, which requires a hearing for a nontenured teacher who alleges—as the teachers do here—that a public educational institution has refused to renew his employment as a punishment for exercising a constitutional right.[4] *See* Brief of the NEA as *Amicus Curiae* 14-15, *Perry* v. *Sindermann*, No. 952, Sup. Ct., O.T. 1970. As the court below recognized (Jur. St. App. 8a-10a), its decision also conflicts with several recent federal district court cases. *Lucia* v. *Dugan*, 303 F.Supp. 112 (D. Mass. 1969); *Roth* v. *Board of Regents* 310 F.Supp. 972 (W.D. Wisc. 1970), *pending on appeal*, Dkt. No. 18490, 7th Cir.; *Gouge* v. *Joint School District No. 1*, 310 F.Supp. 984 (W.D. Wisc. 1970).[5]

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[4] *See also* Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970); Thaw v. Board of Pub. Instr., Dkt. No. 29488, 5th Cir., Sept. 22, 1970.

[5] *See also* Lafferty v. Carter, 310 F. Supp. 465 (W.D. Wisc. 1970). *Compare* Munro v. Elk Rapids Schools, Dkt. No. 52508, Sup. Ct. Mich., Jan. 24, 1970, *rehearing granted*, Nov. 30, 1970. The deci-

There is a vital need to resolve this conflict of judicial authorities. The procedural due process issue presented here arises with great frequency in teacher contract termination cases. NEA is aware of at least four cases now pending on appeal in the federal courts of appeals in which school authorities, without notice and hearing, have refused to renew the contracts of nontenured teachers, *Brown* v. *Portsmouth School Dist.*, Dkt. No. 7667, 1st Cir., (see Footnote 1.); *Orr* v. *Trinter*, Dkt. No. 20721, 6th Cir.; *Roth* v. *Board of Regents*, Dkt. No. 18490, 7th Cir.; *Shirck* v. *Thomas*, Dkt. No. 18790, 7th Cir. Many similar cases are pending in the federal district courts.

3. Plenary consideration of the present case is also warranted because the court below, in holding that nontenured teachers may be summarily dismissed from their employment by a public educational institution without notice and hearing, ignored this Court's holding in *Slochower* v. *Board of Higher Educ.*, 350 U.S. 551, 559 (1956), that "summary dismissal" of a teacher "violates due process of law."

So firm is the concept of procedural due process ingrained in the termination of public employment that this Court recently relied upon the *Slochower* case as a guide to its decision in *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970), which held that a recipient of welfare benefits has a right to notice and a hearing

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sion below further conflicts—at least in principle—with Freeman v. Gould Special School Dist., 405 F.2d 1153, 1161 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969), and Parker v. Board of Educ., 348 F.2d 464 (4th Cir.), *affirming* 237 F.Supp. 222 (D. Md. 1965), *cert. denied*, 382 U.S. 1030 (1966), which, although denying any constitutional right of a nontenured teacher to a hearing in a contract nonrenewal case, acknowledged such a right in a dismissal case.

prior to the termination of such benefits.[6] If a public welfare recipient cannot be deprived of his welfare benefits without procedural due process, *a fortiori*, a teacher should not be terminated from his employment relationship with the government without being accorded the same procedural rights.

4. The Supreme Judicial Court of Massachusetts also misinterpreted this Court's decision in *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961), by ignoring the analytical basis for the decision (Jur. St. App. 10a). This Court stated in *Cafeteria Workers* (367 U.S. at 895):

> "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[7]

Appellants had crucial interests at stake, including their professional reputations and their ability to pursue their chosen professions. *See, e.g., Roth* v. *Board of Regents*, 310 F. Supp. 972, 979 (W.D. Wisc. 1970), *pending on appeal*, Dkt. No. 18490, 7th Cir.; *Orr* v. *Trinter*, Civ. Action No. 70-163, S.D. Ohio, Aug. 3 1970, at 6-7 (Slip. Op.), *pending on appeal*, Dkt. No. 20721, 6th Cir.; *cf. Birnbaum* v. *Trussel*, 371 F.2d 672 (2d Cir. 1966); *Meredith* v. *Allen County War Mem.*

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[6] "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to . . . discharge from public employment" (90 S. Ct. at 1017).

[7] This Court affirmed this analytical basis of *Cafeteria Workers* in its decision in Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 1017 (1970).

*Hosp. Comm'n*, 397 F.2d 33 (6th Cir. 1968). Moreover, because the appellants were dismissed during their contract term, they suffered the "termination of an expectancy of continued employment, and that is an injury to an interest which the law will protect . . . ." *Bomar* v. *Keyes*, 162 F.2d 136, 139 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947); *accord, e.g., Ferguson* v. *Thomas*, 430 F.2d 852, 856 (5th Cir. 1970). Finally, appellants had significant constitutional interests which they alleged had been injured, in that they claimed they had been dismissed in retaliation for their exercise of First Amendment rights of free expression. *See, e.g., Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968); *Pred* v. *Board of Pub. Instr.*, 415 F.2d 851 (5th Cir. 1969).

Given these substantial constitutional, economic and professional interests, appellants should not have been dismissed "without a procedure calculated to determine whether legitimate grounds do exist"; "[a] full hearing was the only way" to protect these interests. *Birnbaum* v. *Trussel*, 371 F.2d 672, 678, 679 (2d Cir. 1966). As the court stated in *Roth* v. *Board of Regents*, 310 F.Supp. 972, 979-80 (W.D. Wisc. 1970), *pending on appeal*, Dkt. No. 18490, 7th Cir.: "Substantive constitutional protection . . . against nonretention in violation of . . . First Amendment rights or arbitrary nonretention is useless without procedural safeguards."[8] Thus, the court concluded in *Gouge* v. *Joint School District No. 1*, 310 F.Supp. 984, 992 (W.D. Wisc. 1970): "[A school] board's ultimate decision may not rest on a basis of which the teacher was never notified, nor may it rest on a basis to which the teacher has no fair opportunity to respond."

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[8] *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1453 (1968).

## CONCLUSION

**For the foregoing reasons, this Court should set this case for plenary consideration on the issue whether the rights of nontenured teachers to procedural due process under the Fourteenth Amendment are violated when a public educational institution, in dismissing the teachers during their contract term, fails to provide them with notice and the opportunity for a hearing.[9]**

Respectfully submitted,

DAVID RUBIN
*Deputy General Counsel*
National Education Association
1201 16th Street, N. W.
Washington, D. C. 20036
202/833-4451

RICHARD J. MEDALIE
ALVIN FRIEDMAN
EPSTEIN, FRIEDMAN AND DUNCAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036
202/628-7234

*Attorneys for the National Education Association*

Dated: December 1970.

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[9] This question, although nonappealable, may be reviewed on appeal should this Court note probable jurisdiction on the appealable issue—whether the lower court was correct in its determination that the Massachusetts Teacher Dismissal Statute does not violate any provision of the United States Constitution. Alternatively, this Court might wish to treat the Jurisdictional Statement as a Petition for a Writ of Certiorari, under 28 U.S.C. §2103, and grant the Petition on the nonappealable procedural due process issue, or the Court might consider postponing the question of jurisdiction until after plenary consideration.

Supreme Court, U.S.
FILED
JAN 14 1971
CLERK

In the

# Supreme Court of the United States

October Term, 1970

No. 1026

Fenton, *et al.*,

*Appellants,*

—v.—

Boston School Committee,

*Appellee.*

On Appeal from the Supreme Judicial Court of Massachusetts

## APPELLANTS' SUPPLEMENTAL BRIEF

Melvin L. Wulf
Lawrence G. Sager
*American Civil Liberties Union Foundation*
156 Fifth Avenue
New York, N. Y. 10010

Roy A. Hammer
73 Tremont Street
Boston, Massachusetts 02100

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

**No. 1026**

---

FENTON, *et al.*,

*Appellants,*

—v.—

BOSTON SCHOOL COMMITTEE,

*Appellee.*

---

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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## APPELLANTS' SUPPLEMENTAL BRIEF

This supplemental brief is filed for the purpose of calling the Court's attention to the recent decision and opinion of the Court of Appeals for the First Circuit in *Drown* v. *Portsmouth School District* (No. 7667, December 18, 1970). A copy of that opinion is hereto appended.

The *Drown* case concerns the rights of a non-tenured teacher upon the occasion of the non-renewal of her annual contract. The Court held that:

> . . . [T]he interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and that the inconvenience and disadvantages for a school board of supplying this information are so slight

> as to require a written explanation, in some detail, of the reasons for non-retention, together with access to evaluation reports in the teacher's personnel file. (Footnotes omitted.) Appendix, *infra*, p. 7a.

At the same time, however, the Court declined to hold that a teacher in such a situation is entitled to a hearing.

The decision in *Drown* v. *Portsmouth School District* adds the voice of the Court of Appeals for the First Circuit to the conflict among Courts of Appeal as to the rights of non-tenured teachers in the public employ. The court in *Drown* itself took measure of the growing division in this area:

> Courts are divided on the issue of the administrative procedural rights to which a non-tenured public school teacher is entitled when he is not rehired. Some say that the teacher has no right to an administrative hearing, although he does have a legal remedy, if he was dismissed for constitutionally impermissible reasons such as his race or the exercise of First Amendment rights. *Freeman* v. *Gould Special School District of Lincoln County, Arkansas*, 405 F.2d 1153 (8th Cir. 1969), *cert. denied*, 396 U.S. 843 (1969). Others have held that a non-tenured teacher is entitled to hearing even when there is no allegation that the decision not to rehire was made for constitutionally impermissible reasons. *Orr* v. *Trinter*, —— F. Supp. —— (S.D. Ohio, Aug. 3, 1970); *Roth* v. *Board of Regents*, 310 F. Supp. 972 (W.D. Wisc. 1970); *Gouge* v. *Joint School District No. 1*, 310 F. Supp. 984 (W.D. Wisc. 1970). Still others have taken a middle course, requiring administrative hearings only when there is an allegation that a con

stitutionally impermissible reason motivated the decision not to rehire. *Ferguson* v. *Thomas*, 430 F.2d 852 (5th Cir., 1970); *Sindermann* v. *Perry*, —— F.2d —— (5th Cir., Aug. 10, 1970). We are faced with this precise question for the first time. (Footnotes omitted.) Appendix, *infra*, pp. 3a-4a.

As noted in Appellants' jurisdictional statement, the mid-term dismissal of a non-tenured teacher for alleged cause—as in the instant case—is a still more compelling circumstance for the application of due process guarantees than is a situation involving the non-renewal of an annual contract.

Respectfully submitted,

MELVIN L. WULF
LAWRENCE G. SAGER
*American Civil Liberties Union Foundation*
156 Fifth Avenue
New York, N. Y. 10010

ROY A. HAMMER
73 Tremont Street
Boston, Massachusetts 02100

January , 1971

# APPENDIX

## UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 7667.

---

PATRICA DROWN,

*Plaintiff-Appellant,*

—v.—

PORTSMOUTH SCHOOL DISTRICT, *et al.*,

*Defendants-Appellees.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

---

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

---

*Jack B. Middleton,* with whom *Peter B. Rotch* and *McLane, Carleton, Graf, Greene & Brown* were on brief, for appellant.

*John C. Driscoll* for appellees.

*Bradley F. Kidder* and *Nighswander, Lord, Martin & KillKelley* on brief for The New Hampshire School Boards Association, amicus curiae.

*David Rubin, Richard J. Medalie, Alvin Friedman,* and *Epstein, Friedman and Duncan* on brief for The National Education Association, amicus curiae.

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December 18, 1970.

COFFIN, *Circuit Judge.* Appellant, a public school teacher, brings this action pursuant to 42 U.S.C. § 1983 against the Portsmouth School District, the administrator, and the school board members of the district. She claims that appellee's failure to offer her a teaching contract for the 1970-71 school year deprived her of rights guaranteed to her by the Constitution.

Appellant was employed as a non-tenured teacher for the 1968-69 and 1969-70 school years. For each year, she was employed under a standard one-year contract. Under New Hampshire law and pursuant to appellant's one-year contract, a non-tenured teacher may not be dismissed without cause and without being afforded certain procedural rights *during* the school year, and tenured teachers are entitled to similar safeguards if they are not rehired. N.H. Rev. Stat. Ann. ch. 186, § 13. But a failure to rehire a non-tenure teacher affords the teacher no rights other than to notification by March 15 of the school year. N.H. Rev. Stat. Ann. ch. 186, § 14-a.

Appellant was given timely notice that she would not be rehired for the 1970-71 school year. She sought and was denied a list of reasons for this decision and a hearing so that she might have an opportunity to challenge it. Her complaint, which was dismissed below as failing to state a cause of action, claims that she was not afforded due process by the school district. She argues that she was denied certain rights, principally that of a hearing when the school district decided not to rehire her.[1]

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[1] Along with the right to a hearing, appellant and the National Educational Association as Amicus Curiae, ask this court to detail other safeguards to which appellant is entitled, including (1) the right to cross-examine witnesses; (2) the right to present both oral

Appellant's contract with appellees implies that the school district has virtually unlimited discretion to rehire her or not. *See* Note, *Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045, 1099-1100 (1968). Nevertheless, there is no doubt that appellant has an interest in being rehired sufficient to prevent the school district from not doing so for constitutionally impermissible reasons. *Slochower* v. *Board of Higher Education of New York City*, 350 U.S. 551 (1956); *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir., *en banc*, 1966), *cert. denied*, 385 U.S. 1003 (1967); *Albaum* v. *Carey*, 283 F. Supp. 3 (E.D. N.Y. 1968). *See generally*, Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1445-58 (1968); Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, 233-43 (1956). But appellant makes no claim of any violation of her collateral constitutional rights; she merely says that the process by which the decision not to rehire her was made does not comport with the fundamental fairness guaranteed her by the Fourteenth Amendment.

Courts are divided on the issue of the administrative procedural rights to which a non-tenured public school teacher is entitled when he is not rehired. Some say that the teacher has no right to an administrative hearing, although he does have a legal remedy, if he was dismissed for constitutionally impermissible reasons such as his race or

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and written arguments; (3) the right to retain counsel; (4) the right to a determination based solely on legal rules and the evidence adduced at the hearing; (5) the right to statement by the decision-maker of his reasons and of the evidence relied on; (6) the right to an impartial decision-maker other than the school board; (7) the right to a hearing on the record so that a verbatim transcript can be made; and (8) the right to be advised of these rights. Presumably, they would also include the right to judicial review.

the exercise of First Amendment rights. *Freeman* v. *Gould Special School District of Lincoln County, Arkansas*, 405 F.2d 1153 (8th Cir. 1969), *cert. denied*, 396 U.S. 843 (1969).[2] Others have held that a non-tenured teacher is entitled to a hearing even when there is no allegation that the decision not to rehire was made for constitutionally impermissible reasons. *Orr* v. *Trinter*, —— F. Supp. —— (S.D. Ohio, Aug. 3, 1970); *Roth* v. *Board of Regents*, 310 F. Supp. 972 (W.D. Wisc. 1970); *Gouge* v. *Joint School District No. 1*, 310 F. Supp. 984 (W.D. Wisc. 1970). Still others have taken a middle course, requiring administrative hearings only when there is an allegation that a constitutionally impermissible reason motivated the decision not to rehire. *Ferguson* v. *Thomas*, 430 F.2d 852 (5th Cir., 1970); *Sindermann* v. *Perry*, —— F.2d —— (5th Cir., Aug. 10, 1970).[3] We are faced with this precise question for the first time.[4]

To determine what, if any, procedures are required when a school board decides not to rehire a non-tenured teacher, we are required to balance the competing interests of the individual teacher and of the school board. *Cafeteria &*

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[2] For a critical analysis of this opinion, see Note, 44 N.Y.U. L. Rev. 836 (1969).

[3] The Fifth Circuit distinguishes between non-tenured teachers who have an expectancy of reemployment and those who do not. Those with an expectancy of reemployment are entitled to the full procedural rights of a teacher with tenure. We are not impressed by this distinction. Almost every teacher, arguably at least, has such an expectancy, and we think a teacher has an interest in employment protected by the due process clause independent of the existence of this quasi-contractual right. *Cf. Birnbaum* v. *Trussell*, 371 F.2d 672 (2d Cir. 1966).

[4] We have, however, decided an analogous case. In *Medoff* v. *Freeman*, 362 F.2d 472 (1st Cir. 1966), we held no hearing was required to guarantee due process to a dismissed probationary government employee who had been informed of the reasons for his dismissal.

*Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961); *cf. Goldberg* v. *Kelly*, 397 U.S. 254 (1970); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, —— Duke L. J. —— (1970) (draft of article submitted by counsel). The school board is interested primarily in its ability to insure the quality of the school system by employing teachers for a probationary period. During this period, the board attempts to evaluate teaching ability to determine if the teacher merits tenure. Such evaluations require judgments about many subjective factors which are difficult to document with precision, such as the ability of the teacher to inspire students, his mastery of and progress in his subject, and his capacity to work effectively with colleagues, supervisors, and parents.

The teacher, particularly one at the outset of his career, is in the position of having invested in preparation for a career which depends mainly on the willingness of public bodies to employ him. Such willingness, as the complaint alleges, is seriously dissipated if not destroyed when an early employer refuses to rehire the teacher. In the present case the plaintiff, after four years of apparently satisfactory performance in Illinois and New Hampshire, confronts a decision not to rehire her without any reason given. This effectively forecloses her from attempting any self improvement, from correcting any false rumors and explaining any false impressions, from exposing any retributive effort infringing on her academic freedom, and from minimizing or otherwise overcoming the reason in her discussions with a potential future employer.

Against this background of competing interests, we assess the benefits and burdens of the rights claimed by appellant. We first examine the effect on both the teacher

and the school authorities of a right to receive a detailed statement of reasons for non-retention, accompanied by access to any teaching evaluation reports.[5] From the point of view of the teacher, such notice would give him the opportunity informally to correct a decision made on the basis of mistaken or false facts. Moreover, he might find that he had evidence that could be used to support a claim that he was not rehired for constitutionally impermissible reasons. Even if the reasons assigned were false ones, demonstrating their falsity would have probative value in a claim that the real reasons lie elsewhere. Additionally, the teacher would have the extra benefit of knowing where his performance failed to live up to expectations—a benefit that may not be constitutionally required but which is surely desirable. Finally, if the reason were to lie in a judgment that the teacher was too innovative and unconventional, this very fact might be turned into a recommendation in the eyes of another possible employer.

From the viewpoint of the school board, a requirement that it state its reasons for not rehiring a non-tenured teacher would impose no significant administrative burden. Nor would it significantly inhibit the board in ridding itself of incompetent teachers. The workability of such a requirement is evident from the fact that several states presently require their school boards to do so, *E.g.*, Wash.

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[5] *See*, Frakt, *Non-Tenure Teachers and the Constitution*, 18 U. Kan. L. Rev. 27, 50-53 (1969).

Access to reports would seem to be a logical consequence of any right to receive a statement of reasons. To the extent that they are consistent with and foreshadow the reasons for non-retention, they both corroborate and give some depth to those reasons. To the extent that, as in the instant case, prior reports do not foreshadow dissatisfaction on the part of the teacher's superiors, the right to access would tend to restrain a board from assigning capricious reasons for its present dissatisfaction.

Rev. Code Ann. § 28.67.070 (1964).[6] As to access to administrative evaluations, we would assume that, since part of their objective is to help the teacher improve, their content is made known to the teacher as a matter of policy.[7] Access as of right has been granted in a number of states. *E.g.*, Conn. Gen. Stat. Ann. § 10-15(a) (Supp. 1969). Finally, while access by a teacher to an administrator's frank appraisal of his ability might lead to embarrassment and friction if the teacher-administrator relationship were to continue, such a consideration is moot when the teacher has not been rehired. The relationship could be further impaired only in the unlikely case that the decision not to rehire were reversed despite negative reports; and in such a case, the avoidance of an unjustified non-retention must outweigh the danger of disharmony.

We therefore hold that the interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and that the inconvenience and disadvantages for a school board of supplying this information are so slight as to require a written explanation, in some detail, of the reasons for non-retention, together with access to evaluation reports in the teacher's personnel file.[8]

Appellant, however, argues further that the right to a statement of the reasons for not being rehired is meaning-

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[6] Alaska entitles a non-tenured teacher to a statement of reasons and a complete bill of particulars. Alaska Stat. § 14.20.180(a) (1962). Further discussions of varying state procedures can be found in Frakt, *supra* at 28-30; and *Developments in the Law—Academic Freedom*, *supra* at 1091-92.

[7] In fact, appellant in this case has received some such reports, possibly all that exist.

[8] A similar result, in a different employment situation, was reached in *Olson* v. *Regents of the University of Minnesota*, 301 F. Supp. 1356 (D. Minn. 1969).

less unless the school board can be forced to prove those reasons at a hearing. As an initial response, we note that a hearing is not constitutionally compelled in all cases where individual rights may be impaired.

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interests . . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union* v. *McElroy*, *supra* at 894-95.

It is obvious that the kind of hearing sought by appellant, *see* note 1, *supra*, would involve the full trappings of counsel, cross-examination, rules of evidence, a verbatim record, and a decider other than the school board. Not only would the invoking of such adjudicative apparatus be an added, expensive and unfamiliar obligation for the school district, but the very existence of the right of a non-tenured teacher to such a hearing would have two side effects, equally unfortunate. In the first place, administrators would be less likely to recommend that teachers not be rehired if they knew that such a decision might require them to go through the time, expense, and often the personal discomfort of a full scale hearing. In such circumstances, the school board is more likely to tolerate incompetent teachers. At the same time, administrators would, to avoid these difficulties in the future, follow a counsel of over-caution in their hiring practices. The innovative teacher would have a more difficult time finding employment if school districts fear they cannot afford to take a chance on him. And the schools would be left with a teaching force of homogenized mediocrities.

Such risks and burdens for the school board might be tolerable if the right to a hearing gave promise of high and unique usefulness in safeguarding the protectible interests of the non-tenured teacher. We therefore inquire as to the nature of these interests and the extent to which they would be served by a hearing.[9]

One interest might well be the opportunity for a probationary teacher in the system to explain his teaching philosophy and methods, which may be at odds with those of his supervisor. But in the light of the school board's wide discretion, and its prerogative to be short-sighted and narrow-minded, a hearing would not be likely to settle the clash of the value judgments any more effectively than informal discussions—assuming, of course, that the teacher is aware of the objections, as he would be if detailed notice is given. A second interest may lie in identifying factually incorrect reasons for non-retention. Once again, if the teacher is made aware of the reasons, and if the school board is acting in good faith, the machinery of a hearing would not appear to be necessary to clear up the misunderstanding.

There remain the teacher's interest in protecting his constitutional rights, such as free speech, and in protect-

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[9] We note, preliminarily, that in any such hearing the burden of persuasion, because of the subjective factors on which a school board may legitimately base its decision on rehiring, would rest on the teacher. For example, testimony concerning a teacher's failure to communicate enthusiasm to his students would have to be conclusory in nature—"He was, or was not inspiring". Even were we to require that appellant be given an administrative hearing, we think that she would have to bear the burden of persuading the decision-maker that the decision not to rehire her was an incorrect one; our research reveals no authorities who argue that the school board should bear the burden of proving its decision correct. *See, e.g., Developments in the Law—Academic Freedom, supra* at 1092; Note, 44 N.Y.U. L. Rev. 836, 842-43 (1969).

ing himself against a decision made in bad faith. It is not easy for us to believe that a significant number of decisions not to rehire non-tenured teachers rest on either ground. In any case, the teacher asserting a constitutional right has guaranteed access to the federal courts. While an administrative hearing may help the teacher by way of flushing up constitutionally impermissible reasons, the chief beneficiaries are the school board itself, which can only profit from reviewing a decision before being subject to possible liability, and the courts, which do not seek unnecessary litigation.[10] From the teacher's point of view, there is little reason for him to prefer the prospect of two full scale constitutional presentations where one could suffice. As to the teacher's interest in guarding against bad faith decisions, we first observe that, as we have noted, the requirement that detailed reasons be assigned is some hindrance to a board so motivated. Secondly, bad faith may rise to a constitutional level, in which case the federal courts are available, or, if not of this magnitude, it may be subject to a state court remedy in tort. *See* W. Prosser, *Handbook of the Law of Torts*, § 126, at 1015-16 (3d ed. 1964). Moreover, an absolute safeguard against the possibility of covert bad faith would involve school boards delegating crucial rehiring decisions to third parties—a resolution which would spawn a host of other problems not the least of which would be the erosion of the educational policy function of school boards. On balance, we conclude that the residual possibility of decisions made in bad faith

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[10] We therefore normally require resort to available administrative hearing prior to initiation of a section 1983 action. See *Dunham* v. *Crosby*, —— F.2d ——, n. 2 (1st Cir., decided this date).

concerning non-tenured teachers does not justify the judicial imposition on the public school systems of the nation of adjudicative hearing procedures."[11]

We recognize that there may, under our solution, be rare instances where an improperly dismissed teacher would not be adequately protected. We wish to stress, however, that our decision here is limited to the case of a non-tenured teacher whose contract is not renewed during a probationary period. Non-tenured teachers are made aware that they have no right to reemployment by their employment contracts which run for only one year and which entitle them to a hearing only if they are dismissed during the course of the year.[12] While it is true that the effect of a decision not to rehire may be the same as dismissal, the teachers have made a contract which entitles them to pro-

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[11] In *Roth* v. *Board of Regents, supra,* cited with approval by appellant, the court stated "[I]t is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer. . . ." 310 F. Supp. at 978. We find it difficult to believe that the scrutiny by either an administrative or a judicial hearing of a decision made on such nebulous but admittedly valid grounds would afford a teacher meaningful protection from arbitrary decisions.

Similarly, we think a requirement that a teacher be afforded an administrative hearing if he makes a constitutional claim or a claim of an actionable wrong, *see Sindermann* v. *Perry, supra,* offers the teacher little more protection than the status quo. Presently, the teacher can make such a claim in the courts, a forum undoubtedly more suited to evaluating them.

[12] Although the requirement that non-tenured teachers be notified by March 15 if they are not to be reemployed may be interpreted as giving the teacher a right to a continuing contract unless notified, the primary right is to notice, not to continued employment. Without a fixed date by which notice must be given, New Hampshire teachers might not have time to search for another job if they were not rehired. To compel school districts to notify teachers in time, the districts are required to offer a contract if they fail to give timely notice. Thus, while non-tenured teachers have a right to notice, they have no right to be rehired except to enforce the notice requirements.

cedural rights only when they are dismissed. Teachers are not powerless to change the terms of their contracts; the procedural rights of non-tenured teachers who are not rehired vary widely from state to state. *See Developments in the Law—Academic Freedom, supra* at 1091-92. Non-tenured teachers who do not like the terms of New Hampshire's contracts can either bargain to change them[13] or can seek employment in states where the terms are different. Thus, in balancing the interests of the school board and the teacher, we must remember that the teachers have agreed to the procedural scheme and that teachers are not powerless to alter the scheme or find employment under a different scheme.

Under the circumstances, we hold that a hearing is not required and that the interests of society, in promoting a better school system, and in protecting the rights of the individual, are best served by the solution we put forth. Since, however, this solution is novel, the defendant cannot in fairness be subjected to the sanctions which ordinarily accompany the violation of pre-existing law. *Cf. Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). We apply the rule developed in this opinion to the appellant, in the event that the court finds that no such reasons have been given, by assuring her of a forthcoming

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[13] Since the provisions of New Hampshire's contracts are determined by law, this is not a normal collective bargaining situation, but to say that teachers cannot bargain to alter laws that affect the terms and conditions of their employment would require the court to shut its eyes to what has happened in the past few years in bargaining between public employees and their employers. *See generally*, Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 Yale L. J. 1107 (1969).

communication of the reasons for her non-retention. We will apply the rule in the future only to those cases where a decision not to rehire is made subsequent to the date of this opinion. It also follows that appellant's claim for damages must be denied.

*The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.*

Supreme Court, U.S.
FILED
JAN 16 1971
E. ROBERT SEAVER, CLERK

**Supreme Court of the United States**

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**OCTOBER TERM, 1970**

**No. 1026**

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**SANDRA FENTON *ET AL.*,**
***Appellants,***

***v.***

**BOSTON SCHOOL COMMITTEE,**
***Appellee.***

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# APPELLEE'S MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

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**PETER L. KOFF,**
**Assistant Corporation Counsel**
**City of Boston Law Department**
**1 City Hall Square**
**Boston, Massachusetts 02201**
**(Tel. 617-722-4100)**
***Attorney for Appellee.***

**Of Counsel:**
**HERBERT P. GLEASON,**
***Corporation Counsel***
***of the City of Boston.***

**Supreme Court of the United States**

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# APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Now comes the Boston School Committee and respectfully moves, pursuant to Rule 16 of the Rules of this Court, that this Honorable Court dismiss the appeal herein, or, in the alternative, affirm the judgment of the Supreme Judicial Court of Massachusetts.

PETER L. KOFF,
Assistant Corporation Counsel
City of Boston Law Department
1 City Hall Square
Boston, Massachusetts 02201
(Tel. 617-722-4100)
*Attorney for the*
*Boston School Committee.*

## BRIEF IN SUPPORT OF APPELLEE'S MOTION TO DISMISS OR AFFIRM

### Statement With Respect to Jurisdiction

In their Jurisdictional Statement (Jur. St. 2),[1] appellants contend that jurisdiction of this Court to review the decision of the Supreme Judicial Court of Massachusetts in this case is conferred by 28 U. S. C. s. 1257 (2) which gives this Court jurisdiction by appeal under the following circumstances:

> "[W]here is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Appellants state that the following three questions are presented by way of appeal under s. 1257 (2):

> "1. Whether appellants, as non-tenured public school teachers, were constitutionally entitled to procedural due process prior to their suspension and dismissal. [Hereinafter referred to as 'the due process issue']
>
> 2. Whether there is a substantial likelihood that appellants' dismissal was based upon activities which are protected by the First Amendment. [Hereinafter referred to as 'the First Amendment issue']
>
> 3. Whether a statutory scheme which grants procedural rights to tenured teachers but withholds them from non-tenured teachers violates the equal protection clause. [Hereinafter referred to as 'the equal protection issue']" (Jur. St. 6)

Assuming that this Court does not concur with the appellee that the decision below rests on an adequate non-federal basis, appellee submits that the due process and First Amendment issues are not properly presented to this Court by appeal under s. 1257 (2). The Supreme Judicial Court of Massachusetts determined that Mass. G. L., c. 71, ss. 42 and 42D (as

[1] "Jur. St." refers to the Jurisdictional Statement and "Jur. St. App." refers to the Appendix in the Jurisdictional Statement.

then existing)[2] do not apply to non-tenured teachers such as appellants. (Jur. St. App. 5a-7a.) Accordingly, since appellants are non-tenured teachers, they cannot (and, in fact, do not) contend that these sections deprive tenured teachers of due process and invalidly infringe upon First Amendment rights. Appellants, as non-tenured teachers, have no standing to complain about the due process and First Amendment implications of these sections. Appellants' due process and First Amendment contentions are not based upon any alleged invalidity in Mass. G. L., c. 71, ss. 42 and 42D, but rather are based upon their belief that the *actual method* of their suspension and dismissal violated due process and infringed their rights under the First Amendment. Such contentions are not appealable but may be reviewed only by writ of certiorari.[3]

The only appealable issue presented by appellants is their contention that Mass. G. L., c. 71, ss. 42 and 42D, deny equal protection to non-tenured teachers. However, since this Court may treat appellants' Jurisdictional Statement as a petition for a writ of certiorari under 28 U. S. C. s. 2103, appellee will discuss the due process and First Amendment issues as if they had been presented in such a petition.

## I.

**The judgment of the Supreme Judicial Court of Massachusetts rests on an adequate non-federal basis.**

Appellee submits that the present appeal should be dismissed because the judgment of the Supreme Judicial Court

[2] See footnote 5, *infra*.

[3] This distinction is recognized in the Motion for Leave to File and Memorandum of the National Education Association as Amicus Curiae (p. 8, n. 9). In addition, the distinction was recognized by the court in *Lucia* v. *Duggan*, 303 F. Supp. 112 (D. Mass. 1969). In *Lucia*, the court refused to declare Mass. G. L., c. 71, ss. 42 and 42D, unconstitutional on equal protection grounds. 303 F. Supp. at 119, n. 5. On the other hand, the court held that the *actual method* of the plaintiff's dismissal violated due process. 303 F. Supp. at 118–119.

rests upon an adequate non-federal basis. This is made clear at the outset of the state court's opinion when it states as follows:

> "1. We are faced at the outset with a jurisdictional question not raised by the parties. No final decree was entered in the Superior Court. It is settled that an appeal from an order for decree has no standing. G. L. c. 214, s. 19. . . . [citations omitted] . . . Since no bill of exceptions was filed or allowed, the plaintiffs' exceptions are not open to review. G. L. c. 231, s. 113 . . . [citations omitted] . . . The issues, however, have been fully argued. There are presented questions of great importance both to the plaintiffs, who understandably desire a speedy determination of their status, and to the public. We therefore deem it advisable to express our opinion on the issues. [Citations omitted.]" Jur. St. App. 4a-5a.

The Supreme Judicial Court apparently believed that a resolution of the present case purely on procedural issues would be unwise (though not improper). The court made it quite clear, however, that there were *two* state bases upon which the trial court's decision might be affirmed — the absence of a final decree and the absence of a bill of exceptions. Both a final decree and a bill of exceptions are clearly and unequivocally required under the statutory provisions and case law cited by the state court.

## II.

**Mass. G. L., c. 71, ss. 42 and 42d, do not deny equal protection to non-tenured teachers.**

Appellants' Jurisdictional Statement accurately sets forth the relevant provisions of Mass. G. L. c. 71, ss. 42 and 42D,[4]

[4] Appellants' Jurisdictional Statement also set forth Mass. G. L., c. 71, s. 41, but appellee fails to see the significance of this section with respect to the issues raised by appellants.

as they existed at the time of appellants' suspension and dismissal.[5] (Jur. St. 3–5). These sections confer certain procedural rights upon teachers "employed at discretion" (i.e., tenured teachers). These sections do not give the same rights to non-tenured teachers.[6] In view of appellants' due process and First Amendment contentions, however, it is important to point out that these sections do not *deny* any procedural rights to non-tenured teachers; rather the sections are merely silent with respect to the rights of such teachers. Thus, the equal protection issue before this Court is whether a state statute which gives certain procedural rights to tenured teachers prior to dismissal or suspension and is silent as to the procedural rights of non-tenured teachers denies equal protection to non-tenured teachers.

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[5] Since appellants' suspension and dismissal (and since the decision of the Supreme Judicial Court of Massachusetts), G. L., c. 71, s. 42, has been amended by St. 1970, c. 388, which provides as follows:

"SECTION 1. Section 42 of chapter 71 of the General Laws is hereby amended by inserting after the first sentence: — A teacher not employed at discretion under the preceding section and who has been teaching for more than ninety days shall not be dismissed for any reason unless at least fifteen days, exclusive of customary vacation periods, prior to the meetings at which the vote is to be taken, he shall have been notified of such intended vote and, if he so requests, he shall have been furnished by the committee with a written statement of the cause or causes for which the dismissal is proposed and if he so requests, he has been given a hearing before the school committee at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and examine them, and the superintendent shall have given the committee his recommendations thereon.

"SECTION 2. Section 42 of chapter 71 of the General Laws, as amended by section one of this act, shall not apply to the renewal of a contract of a teacher not employed at discretion under the provisions of section forty-one of said chapter seventy-one." (*Approved June 4, 1970.*)

[6] See, e. g., the differences in the rights accorded to tenured and non-tenured teachers with respect to dismissal under G. L., c. 71, s. 42, as amended by St. 1970, c. 388. Footnote 5, *supra*. See also *Drown* v. *Portsmouth School District*, F. 2d (1st Cir., December 18, 1970).

Appellee submits that ss. 42 and 42D satisfy the tests of equal protection because, for purposes of suspension and dismissal, tenured and non-tenured teachers may be treated differently. This is not to say that non-tenured teachers have no constitutional procedural rights prior to suspension or dismissal. Rather, a state may accord certain rights to tenured teachers without according the same rights (though according different rights) to non-tenured teachers.

The propriety of distinguishing between tenured and non-tenured teachers is so well settled that it has been assumed in several of the cases relied upon by appellants and the amicus. E.g., *Drown* v. *Portsmouth School District*, F.2d (1st Cir., December 18, 1970); *Roth* v. *Board of Regents*, 310 F. Supp. 972 (W. D. Wisc. 1970); *Lucia* v. *Duggan*, 303 F. Supp. 112 (D. Mass. 1969). In *Drown*, Judge Coffin, in a thoughtful opinion, refers to a school board's "prerogative to be short-sighted and narrow-minded" with respect to the hiring of non-tenured teachers.[7] In *Roth*, the court stated that "it is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer". 310 F. Supp. at 978. In both *Drown* and *Roth* (and indeed in almost all the cases relied upon by appellants and the amicus) the issue before the court is not whether a distinction in procedural rights based on tenure denies equal protection but

[7] Judge Coffin describes the interests of a school board with respect to non-tenured teachers as follows:

> ". . . The school board is interested primarily in its ability to insure the quality of the school system by employing teachers for a probationary period. During this period, the board attempts to evaluate teaching ability to determine if the teacher merits tenure. Such evaluations require judgments about many subjective factors which are difficult to document with precision, such as the ability of the teacher to inspire students, his mastery of and progress in his subject, and his capacity to work effectively with colleagues, supervisors, and parents."

rather whether, under the particular facts of each case, a non-tenured teacher has been deprived of due process or of rights guaranteed by the First Amendment.

*Lucia* is the only case to discuss the equal protection issue. In that case, the court held that the plaintiff had been denied due process but rejected the plaintiff's equal protection argument in the following cursory footnote:

> "The court has considered and rejects plaintiff's further prayer that Mass. G. L. c. 71, ss. 42 and 42D be declared unconstitutional *per se* because they deny non-tenure teachers equal protection of the laws. 'There are valid reasons for treating the probationary teacher differently from the permanent teacher'. Developments in the Law — Academic Freedom, 81 Harv. L. R. 1045, 1092." 303 F. Supp. at 119, n. 5.

In summary, appellee submits that appellants' equal protection issue does not present a substantial federal question[8] and the decision of the Supreme Judicial Court should be affirmed on this issue.

## III.

**The manner of appellants' suspension and dismissal did not violate due process.**

As already suggested, appellants' due process question is not appealable. However, appellee will discuss this issue as if it had been presented by a petition for writ of certiorari.

To begin with, appellee wishes to make it clear that it does not contend that appellants, as non-tenured teachers, have no right to due process.[9] Thus, appellee is in agreement with the main thrust of appellants' argument on the due process

[8] It is worth noting that a decision by this court on the equal protection issue would involve a decision with respect to a state law that has been substantially amended. See footnote 5, *supra*.

[9] To the extent that the Supreme Judicial Court of Massachusetts held to the contrary, appellee does not rely upon that holding.

question (Jur. St. 11–15). Appellee does submit, however, that it is apparent that, based upon the undisputed facts, appellants were not deprived of due process in this case. Accordingly, appellee will briefly set forth the relevant facts.[10]

On September 4, 1968, a demonstration took place at the Gibson School. On the next day, September 5, the demonstrators returned. Some of the demonstrators went behind the school to the yard where the children were being assembled for the start of classes, and announced that there would be no school that day at the Gibson School. Almost all the children were then led by the demonstrators to the Robert Gould Shaw House, a community center. The appellants, without informing, consulting with, or obtaining the consent of their superiors at the school, accompanied the demonstrators and the children to the Shaw House and conducted their classes there for the entire day.

Appellants returned to the Gibson School on the next morning, September 6, but were refused admittance. They were informed that they had been suspended for seven days by the Superintendent of Schools for unauthorized absence on September 5.[11] Appellants continued to teach at the Shaw House, where a considerable number of students from the Gibson School were still being taught.

On September 6, each appellant was notified by letter (Exhibit 5) of a hearing "on your suspension" to be held at 3:00 p.m. on September 11 at the School Committee Headquarters. No additional notice of the charges against appellants was ever given by the Committee to any of them. (Jur. St. App.

[10] Unless otherwise indicated, the succeeding statement of facts is derived from the opinion of the Supreme Judicial Court of Massachusetts. (Jur. St. App. 2a–4a.) It deviates from the court's opinion only in supplementing it with additional undisputed facts of record.

[11] Appellants have waived any claim that the initial seven-day suspension was unlawful.

18a.) Appellants were represented by counsel at the September 11 hearing. A verbatim transcript of that hearing was taken (Exhibit 1). At the September 11 hearing, counsel for appellants requested a continuance and a public hearing. At no time during the September 11 hearing did any counsel for appellants request a more specific notification of the charges against appellants (Exhibit 1). The Committee granted appellants' request for a continuance to September 25 but stated that the hearing on that date would be a closed hearing. The Committee further stated that the thirty-day suspension had been brought about by appellants' request for a continuance and was necessary to preserve the *status quo* pending the September 25 hearing (Exhibit 1, e.g., pp. 11–17, 25–26) and at least one counsel stated that he had expected that the suspension would be continued pending the actual hearing (Exhibit 1, p. 10).

The Committee also stated at the September 11 hearing that it was considering passing an order terminating appellants' contracts effective thirty days after delivery of notice. The Committee explained to appellants' counsel that it deemed such action to be necessary in order to insure the effectiveness of any order entered at the September 25 hearing. In other words, the thirty-day suspension would expire on October 11. Unless the Committee voted to terminate appellants' contracts on September 11, appellants (according to the Committee's understanding of the law) would be able to teach at the Gibson School from October 12 to October 25, even though the Committee might vote to terminate their contracts at the September 25 hearing. In order to prevent such an anomaly, the Committee voted to terminate the contracts on September 11 (Exhibit 1, pp. 24, 38). A waiver of the thirty-day notice was proposed by appellants' counsel (Exhibit 1, p. 29) and, in view of this offer, the termination vote was rescinded by

the Committee (Exhibit 1, pp. 33, 38). However, appellants' counsel later reneged on their prior agreement regarding the waiver of the thirty-day notice (Exhibit 1, pp. 39–42) and, as a result, the Committee, in order to prevent the aforementioned anomalous situation, voted to terminate appellants' contracts (Exhibit 1, p. 51). Finally, at the September 11 hearing, the Committee made it perfectly clear to appellants' counsel that its orders with respect to the thirty-day suspension and the termination of appellants' contracts would both be subject to review at the hearing scheduled for September 25 (Exhibit 1, pp. 7–8, 24, 26, 45–46, 52, 55).

Appellants do not clearly set forth their contention as to the manner in which they were denied due process. Apparently, they contend that they were suspended and dismissed without a prior hearing (Jur. St. 11). In the state court, they also contended that they had not received notice of the charges against them.[12] Although this argument is not raised in the Jurisdictional Statement, appellee will briefly discuss it.

With respect to notice, it is undisputed that on September 6 appellants "were informed that they had been suspended for seven days by the Superintendent of Schools for unauthorized absence on September 5" (Jur. St. 8–9). On the same day appellants were also notified that the School Committee would conduct a hearing on September 17 "on your suspension." The nature of the charges against appellants was so well known that appellants' counsel sought no explanation of the charges at the September 11 hearing. To contend that appellants did not know the nature of the charges against them would be disingenuous.

The main thrust of appellants' due process argument is that they were suspended and dismissed without a prior hearing.

[12] Appellants apparently no longer contend that they were entitled to a "public" hearing (Exhibit 1, pp. 17–22). There is no support for such a contention.

However, it is undisputed that they were offered a hearing on September 11, before the imposition of the thirty-day suspension and the notice of dismissal, and that a hearing was not held on that date because of appellants' request for a continuance. These facts alone strongly suggest that appellants have waived any right to a prior hearing. The reasonableness of the School Committee's action on September 11, however, can be justified on other grounds.

The situation facing the School Committee on September 11 was as follows. Appellants were charged with absenting themselves from school on September 5. As a result, they had been suspended for seven days. During this seven-day period appellants had continued to teach at the Shaw House, thereby encouraging "a considerable number of students" to absent themselves from the Gibson School (Jur. St. 9). It was by no means made clear to the Committee that appellants wished to return to the Gibson School even if they were reinstated (Exhibit 1, pp. 6-7, 16).[13] Furthermore, at least one counsel indicated that he had expected a continuation of the suspension pending a hearing (Exhibit 1, p. 10). Under these circumstances, appellee submits that the continuation of the suspension pending the hearing on September 25 was entirely reasonable and did not violate due process.

With respect to the Committee's decision on September 11 to notify appellants of their dismissal, appellee will not here reiterate the Committee's reasoning. However, appellee does wish to point out that appellants' dismissal was not to become

[13] No one of appellants' counsel objected to the following statement by Committeeman Tierney:

> It is my feeling by acceding to your request for a continuance you are forcing the Committee to continue the suspension and, also, in view of the fact that your clients have not indicated their readiness and willingness to come back to teach at the Gibson if this Committee so determines they would accept them back." (Exhibit 1, p. 16)

effective until October 11 and that the Committee's action with respect to the dismissal was subject to review and possible revision at the proposed hearing on September 25. Thus, it is inaccurate to state baldly that appellants were dismissed without a prior hearing. If there was no prior hearing, it was because appellants refused to appear.[14]

The question, so far as due process is concerned, is whether appellants can spurn a school committee's attempts to give them a hearing and then, after the committee has acted in the appellants' absence, claim that they were denied due process. The answer should be an emphatic: No.

Appellee submits that appellants' due process issue raises no substantial question for this Court's consideration.

## IV.

**Appellants' dismissal was not based upon the exercise of First Amendment rights.**

Appellants contend that their dismissal "may" well have been based upon activities which are protected by the First Amendment guarantees of free expression. (Jur. St. 15–18.) This argument is based upon appellants' belief that absenting themselves from the Gibson School on September 5 was a constitutionally protected method of expressing their views in support of community control over the operations of the Gibson School. But this Court rejected such an argument in *United States* v. *O'Brien*, 391 U. S. 367, where it stated:

> "We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct

[14] Appellee assumes throughout this argument that appellants, as non-tenured teachers, were entitled to a hearing prior to dismissal. But see *Drown* v. *Portsmouth School District*, *supra*.

> is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." At pp. 376–377.

The *O'Brien* test may be easily applied to the present case. Compelling the attendance of teachers is within the constitutional power of the government and is essential if the important governmental interest in educating children is to be accomplished. Individual teachers may think that schools would be more effective if they were run in a manner different from that which the School Committee and its executive officers decide. Perhaps such teachers are right, but suspending teachers because they do not appear in their classrooms but choose instead to induce children to spend the day elsewhere is not an unconstitutional suppression of free expression.

Whatever the merits of appellants' First Amendment claim, it has been decided by the Superior Court in the present case that appellants "were not in any way penalized by the Committee for such views [i.e., community control] or for their exercise of their constitutional rights of free speech and association." (Jur. St. App. 15a). Though appellants may contend that this decision was improper (but see *United States* v. *O'Brien*, *supra*) it would be anomalous to require the School Committee to reconsider its motivation after a court has decided that it was properly motivated. However, this is precisely what appellants seek (Jur. St. 18). The fact of the matter is that appellants have received judicial review of their First Amendment claim. Nothing more is required. Indeed, in *Drown* v. *Portsmouth School District*, F. 2d (1st Cir., December 18, 1970), the court held that a prior hearing was unnecessary to protect non-tenured teachers' First Amendment claims because such claims could always be raised in the courts.

Appellee submits that appellants' First Amendment issue does not present a substantial federal question.

## Conclusion

Appellee submits that the following action should be taken on the present appeal:

(1) The appeal should be dismissed because it rests upon an adequate non-federal basis;

(2) Alternatively, the decision of the Supreme Judicial Court of Massachusetts should be affirmed;

(3) Alternatively and in the event that appellants' Jurisdictional Statement is treated as if it were a petition for writ of certiorari, certiorari should be denied.

Respectfully submitted,

Peter L. Kerr
*Assistant Corporation Counsel*
City of Boston Law Department
1 City Hall Square
Boston, Massachusetts 02201
(Tel. 617-722-4100)
*Attorney for the Boston School Committee*

Of Counsel:
Herbert P. Gleason,
*Corporation Counsel*
*of the City of Boston*

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